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No. 07-1310

IN THE

Supreme Court of the United States

JULIO CESAR VALENZUELA GRULLON,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, MICHAEL J. GARCIA, EDWARD J. MCELROY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

BOZENA ZIEDALSKI
350 Fifth Ave, Suite 1729
New York, NY 10118
(212) 629-0454

MARK E. HADDAD*
ROBERT A. HOLLAND
SETH M. GOLDSTEIN
HOLLY L. HENDERSON
MAYA R. RUPERT
SIDLEY AUSTIN LLP
555 W Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

April 15, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

1. Whether compliance with the exhaustion requirement of 8 U.S.C. § 1252(d)(1) of the Immigration and Naturalization Act ("INA") requires a person subject to an order of removal to file an appeal to the Board of Immigration Appeals (the "Board") in order to raise an argument that the Board already squarely rejected *en banc*.

LIST OF PARTIES AND AFFILIATES

The parties to the proceeding are set forth in the caption to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Julio Cesar Valenzuela Grullon ("Valenzuela") respectfully requests that this Court grant the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 509 F.3d 107 (2d Cir. 2007) and is reproduced in the Appendix to this Petition ("Pet. App.") 1a-17a. The transfer Order of the U.S. District Court, Southern District of New York appears at Pet. App. 18a. The order of the Immigration Judge appears at Pet. App. 19a-21a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on November 27, 2007, amended on January 7, 2008. Pet. App. 1a. On February 13, 2008, this Court granted an application for an extension of time within which to file a petition for certiorari to and including March 26, 2008. On March 18, 2008, this Court granted an application for a second extension of time within which to file a petition for certiorari to and including April 15, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1252(d)(1) provides in pertinent part:

> Judicial review of orders of removal .... (d) Review of final orders. A court may review a final order of removal only if – (1) the alien has exhausted all administrative remedies available to the alien as of right ...."

Section 8 C.F.R. § 1003.1(a)(5) provides in relevant part:

> En banc process. A majority of the permanent Board members shall constitute a quorum for purposes of convening the Board en banc. The Board may on its own motion by a majority vote of the permanent Board members, or by direction of the Chairman, consider any case en banc, or reconsider as the Board en banc any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions.

Section 8 C.F.R. § 1003.1(e) provides in relevant part:

> Case management system. The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph.
>
> (1) Initial screening. All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in

paragraph (d)(2) of this section should be promptly dismissed.

....

(3) Merits review .... A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) Affirmance without opinion.

(i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is,

therefore, the final agency determination. See 8 CFR 1003.1(e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

(5) Other decisions on the merits by single Board member. If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) Panel decisions. Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

....

STATEMENT OF THE CASE

This case presents a square conflict among the courts of appeals as to the construction of 8 U.S.C. § 1252(d)(1) which sets the requirements for exhausting administrative remedies before a person subject to an order of removal may obtain judicial review. In his appeal to the Second Circuit, petitioner sought to challenge the construction of federal law by the Board of Immigration Appeals in an en banc ruling of the Board in another case. That construction of law was applied by an Immigration Judge ("IJ") to petitioner in ordering petitioner's removal. Petitioner's sole claim in federal court was that the Board had misconstrued federal law; that the reasoning of the four Board dissenters, rather than the 11 majority panelists, is correct; and therefore that he should not have been ordered

removed. Before seeking federal court review, petitioner did not take the fruitless step of appealing to the Board, whose regulations required summary affirmance of the IJ's decision without consideration even by a panel of the Board of the basis of its previous en banc decision.

In a ruling that expressly "rejected" a prior decision of the Ninth Circuit, *see Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004), and that conflicts with a Fifth Circuit decision as well, *see Arce-Vences v. Mukasey*, 512 F.3d 167 (5th Cir. 2007), the Second Circuit held that it is barred even from considering petitioner's argument that the Board has misconstrued federal law. Specifically, the court held that petitioner's failure to appeal the order of removal to the Board amounts to a failure to exhaust "all administrative remedies available to the alien *as of right*." 8 U.S.C. § 1252(d)(1) (emphasis added), even though the Board's own streamlining regulations would have constrained the Board to reject petitioner's appeal.

Critically, the Department of Justice ("DOJ") has promulgated "streamlining" regulations that remove any right an alien would otherwise have to Board reconsideration of a prior en banc holding. In response to a deluge of appeals, the DOJ adopted rules that send each newly filed appeal to a single Board member for screening. A single member is forbidden to refer an appeal to a three-member panel or the Board en banc if the decision below correctly applied controlling Board precedent and the appellant does not point to any intervening regulation, Board or judicial precedent, or act of Congress. Had petitioner filed an appeal with the Board, the Board's streamlining rules would have required the Board to summarily affirm the decision below.

In short, the Board's own rules state plainly that the petitioner has no right to have even a panel (let alone the Board en banc) reconsider a prior deeply divided en banc decision. To the contrary, the DOJ's regulations ensure that access to such reconsideration is at best discretionary. The Second Circuit has nonetheless held that an alien must first file an appeal that the Board will not hear in order to obtain review of an order of removal in federal court. To characterize the burdensome, expensive and fruitless appeal as a "remedy available as of right" robs these words of any sensible meaning.

The Second Circuit's construction of Section 1252(d)(1) conflicts with that of the Ninth Circuit. Drawing a practical distinction between remedies that are merely "available" and those that are available "as of right," the Ninth Circuit has held that a person subject to an order of removal has a remedy "as of right" only when the Board's review is not wholly constrained by prior adverse decisions. In the Ninth Circuit's view, where the Board has previously ruled on a question of law and thus would be required to apply that precedent to a subsequent litigant without any reconsideration, a person's appeal to the Board is not available "as of right." Similarly, the Fifth Circuit has concluded that appeal to the Board is not available "as of right" under Section 1252(d)(1) when the Board's decision would be wholly constrained by prior adverse judicial precedent.

The question presented is both important and recurring. Section 1252(d)(1) is an important federal statute and should receive a uniform interpretation. Aliens seeking review of orders of removal in the Second Circuit must pursue a pointless and burdensome appeal, while those in the Ninth and

Fifth Circuits need not do so. Those unaware or confused by the Second Circuit's departure from the exhaustion rule in other circuits will lose their ability to obtain federal court review of their removal orders. Some 40 thousand appeals on average are filed with the Board annually, and nearly all of these are disposed of after review by a single Board member. Whether participation in this truncated process is a prerequisite for an alien who wishes to challenge one of the Board's binding precedents thus affects innumerable individuals. Many of these individuals have limited means to finance unnecessary Board appeals, yet must do so or lose their opportunity to challenge an order of removal in federal court.

The stakes are high, as well, for our system of justice and for the integrity of the scheme of review devised by Congress. A federal court that lacks subject matter jurisdiction cannot provide relief to a litigant even to avoid "manifest injustice." Pet. App. 16a-17a; *see Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007). There is no safety-valve to address injustice where subject-matter jurisdiction is lacking. It is therefore exceptionally important that this Court ensure that the lower courts correctly apply the jurisdictional lines drawn by Congress and do not turn away cases that Congress has empowered them to hear.

I. STATUTORY BACKGROUND

A. The Board Of Immigration Appeals

The Board is the highest administrative body for interpreting and applying immigration laws, subject to the general supervision of the Executive Office for Immigration Review ("EOIR") within the DOJ. 8 C.F.R. § 1003.1(a)(1). The Board's 15 members who are attorneys appointed by the Attorney General to

act as the Attorney General's delegates in the cases that come before them. *Id.*

The Board has jurisdiction over administrative appeals filed from decisions rendered by Immigration Judges ("IJs") and certain Department of Homeland Security ("DHS") officials.[1] *Id.* § 1003.1(b). The Board's decisions are final, *id.* § 1003.1(d)(7),[2] and are "binding on all officers and employees of the Department of Homeland Security or immigration judges." *Id.* § 1003.1(g). By majority vote, the Board may designate selected decisions of the Board "to serve as precedents in all proceedings involving the same issue or issues." *Id.*

B. The Streamlining Regulations

Before 1999, panels comprised of three Board members reviewed all appeals, even those presenting no colorable basis for appeal. *See Board of Immigration Appeals: Procedural Reforms To Improve Case*

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[1] On March 1, 2003, the functions of the Immigration and Naturalization Service ("INS") were transferred to the Department of Homeland Security ("DHS"), with immigration enforcement functions placed within the United States Immigration and Customs Enforcement ("ICE") and immigration service functions placed within the United States Citizen and Immigration Services ("USCIS").

[2] Except in those cases reviewed by the Attorney General in accordance with paragraph (h). 8 C.F.R. § 1003.1(d)(7). Section 1003.1(h)(1) provides that:

> The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him. (ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review. (iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.

Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002). The volume of appeals proved too great for the panels to handle. The number of appeals to the Board grew from fewer than 3,000 in 1984 to more than 28,000 in 1998. *See Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining,* 64 Fed. Reg. 56,135, 53,136 (Oct. 18, 1999). By September 2001, the number of pending appeals had grown to nearly 58,000. 67 Fed. Reg. at 54,878.

In response to a growing backlog of appeals, the DOJ promulgated the "streamlining" regulations, to "enable the Board to render decisions in a more timely manner, while concentrating its resources primarily on cases where there is a reasonable possibility that the result below was incorrect, or where a new and significant issue is presented." 64 Fed. Reg. at 56,136. Under the 1999 rules, the Chairman of the Board "may" designate certain categories of cases as suitable for review by a single Board member. The single Board member, in turn, "may affirm" an Immigration Judge's ("IJ's") decision without opinion if certain conditions are met. 8 C.F.R. § 3.1(a)(7) (1999).

In 2002, the DOJ expanded the single member process, initially assigning all cases to a single member and providing that the single Board member "shall affirm" an IJ's decision if certain conditions are met, and may refer a case to a three-member panel "only" under certain circumstances. 8 C.F.R. § 1003.1(e)(4)(i) & (6). The DOJ intended "the single-member process to be the dominant method of adjudication for the large majority of cases before the Board." 67 Fed. Reg. at 54,879. In 2003 and 2004, more than ninety percent of appeals to the Board were decided by a single member. *See* Office of

Planning & Analysis, U.S. Dep't of Justice, *EOIR Review FY2004: Statistical Yearbook* U1 (2005), *available at* http://www.usdoj.gov/eoir/statspub/fy04syb.pdf; Office of Planning & Analysis, U.S. Dep't of Justice, *EOIR Review FY2003: Statistical Yearbook* U1 (2004), *available at* http://www.usdoj.gov/eoir/statspub/fy03syb.pdf. By January 2006, the backlog had been reduced by nearly fifty percent to 28,000. *See* EOIR, *Fact Sheet: BIA Restructuring and Streamlining Procedures* (rev. ed. Mar. 9, 2006), *available at* http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.htm.

The scope of any single Board member's review is constrained by rules set forth in paragraphs (e)(4), (e)(5) and (e)(6). Paragraph (e)(4) sets forth the conditions under which a Board member "shall affirm" a decision of an IJ without opinion. 8 C.F.R. § 1003.1(e)(4)(i). Summary affirmance is required

> if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or (B) The factual and legal questions raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

Id. If the Board member affirms without opinion, "the Board shall issue an order that reads as follows: 'The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. 1003.1(e)(4).'" *Id.* § 1003.1(e)(4)(ii). Such order "shall not include further explanation or reasoning," and

only "approves the result reached in the decision below [and] does not necessarily imply approval of all of the reasoning of that decision." *Id.*

Paragraph (e)(5) permits the Board member to render other types of decisions on the merits under other specified circumstances. If the Board member determines "that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6)." *Id.* § 1003.1(e)(5). The Board member may reverse the decision below only "if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation." *Id.*; *see also* 67 Fed. Reg. at 54,887 (stating that "it is reasonable to expect that most reversals would likely have been handled by a three-member panel rather than by single Board members," and indicating purpose of the (e)(5) reversal provision is to permit single Board member to summarily vacate IJ's order in "cases where reversals may be required as a nondiscretionary matter").

Paragraph (e)(6) limits the Board member's ability to refer an appeal to a three-member panel.

> Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:
>
> (i) The need to settle inconsistencies among the rulings of different immigration judges;
>
> (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

> (iii) The need to review a decision by an immigration judge or the Service[3] that is not in conformity with the law or with applicable precedents;
>
> (iv) The need to resolve a case or controversy of major national import;
>
> (v) The need to review a clearly erroneous factual determination by an immigration judge; or
>
> (vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

8 C.F.R. § 1003.1(e)(6).

A single Board member may not refer an appeal to the Board en banc. Only the Board "on its own motion by a majority vote of the permanent Board members," or the Chairman may initiate en banc proceedings. *Id.* § 1003.1(a)(5). Such proceedings "are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions." *Id.*

An appeal to the Board is an optional part of the administrative process. "[T]he decision of [an] Immigration Judge becomes final ... upon expiration of the time to appeal if no appeal is taken." 8 C.F.R. § 1003.39. A final decision can then become the basis for judicial review. "Judicial review of a final order of removal ... is governed ... by chapter 158 of title 28" of the United States Code. 8 U.S.C. § 1252(a)(1). A

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[3] The term "Service" means the Immigration and Naturalization Service ("INS"), as it existed prior to March 1, 2003. Unless otherwise specified, references to the Service after that date mean the USCIS, the United States Customs and Border Protection, and ICE. *See* 8 C.F.R. § 1.1(c).

court may review such an order, however, "only if – (1) the alien has exhausted all administrative remedies available to the alien as of right." *Id.* § 1252(d)(1).

II. FACTUAL AND PROCEDURAL HISTORY

Mr. Valenzuela Grullon ("Valenzuela") entered the United States as a lawful permanent resident with his sister on December 5, 1994. Though Valenzuela became eligible to apply for United States citizenship status after five years of lawful residency, he did not file an application for naturalization. He remained an alien under the law, and thus vulnerable to deportation from the United States for conviction for the commission of an offense.

A. Valenzuela's Arrest and Conviction

On November 29, 2001, Valenzuela was arrested and, on February 6, 2002, he pleaded guilty to and was convicted of a single offense – criminal possession of a controlled substance in the second degree. At the time of his plea bargain, Valenzuela was unaware of the immigration consequences that would automatically follow his state law conviction. Neither counsel nor the state trial court advised him of these consequences. Because he had been in state custody for two months pending his criminal case, a guilty plea in exchange for a short drug program appeared fair "while not taking into account the consequence of deportation lurking in the background." *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598, 604 (M.D. Pa. 2000). At the time of his conviction, Valenzuela had accumulated seven years and two months of continuous residency in the United States.

B. Removal Proceedings

One month before his October 2002 release on parole, the Immigration and Naturalization Service ("INS") initiated removal proceedings against Valenzuela based on his conviction for violating a state law related to a controlled substance. 8 U.S.C. § 1227(a)(2)(B)(i).[4] Upon his release from state custody, he was detained by the INS. On December 3, 2002, Valenzuela filed a petition for writ of habeas corpus in the United States District Court for the Southern District of New York, arguing that mandatory detention without bond during the pendency of his removal proceedings was unconstitutional. His petition was granted and he was released on December 23, 2002, on $5,000 bond. He returned to his home in New York City and began serving his term of parole.

After Valenzuela's release, the INS transferred his removal proceedings to the Immigration Court in New York City. Valenzuela duly appeared before an Immigration Judge ("IJ") in New York City at three master calendar hearings during the spring of 2003. During these proceedings, Valenzuela argued that he was eligible for cancellation of removal Section 240A(a) of the Immigration and Naturalization Act ("INA"), which provides for cancellation if an alien "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has

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[4] Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* ("INA"), provides that any alien may be removed if "convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." *Id.* § 1227(a)(2)(B)(i).

not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a).

A provision commonly referred to as the "stop-time rule" states that the period of continuous residence required by section 240A(a)(2)

> shall be deemed to end ... when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 237(a)(4), whichever is earliest.

8 U.S.C. § 1229b(d). Because the dates of Valenzuela's offense and arrest occurred five days before he met the seven-year residence requirement, and his conviction occurred two months after he met the requirement, his eligibility for cancellation depended upon interpretation of the stop-time rule. Valenzuela argued that the rule should be interpreted to terminate the period of continuous residence only upon conviction rather than upon the date of an arrest or of the underlying conduct.

The Board had previously addressed the issue of when the stop-time period begins to run in a precedential en banc decision, *In re Perez*, 22 I&N Dec. 689 (BIA 1999) (en banc). There, the Board stated that "[i]t would strain our reading of section 240A(d)(1) to interpret the statute as permitting any date to be used for calculating the period of continuous residence or presence other than the date the offense was committed." *Id.* at 693. The four dissenters, however, argued that termination of residence time could occur only upon the event that rendered the alien removable, which, in the case of Perez, was his conviction for a controlled substance

violation. *Id.* at 701, 707. Valenzuela admitted that "[p]ursuant to the current agency's interpretation of the time-stop provision, it appears that [he] is ineligible for cancellation of removal," but, relying on the *Perez* dissent, argued that the "agency interpretation of the time-stop rule is unreasonable." *See* JA at 21-22, *Valenzuela Grullon v. Ashcroft*, 509 F.3d 107 (2d Cir. 2007) (No. 05-4622).

Declaring Valenzuela to be ineligible for cancellation of removal, the IJ pretermitted his application and ordered him removed from the United States on August 21, 2003. The IJ also denied Valenzuela's request to continue proceedings. Valenzuela did not appeal the IJ's decision to the Board. Accordingly, the IJ's order of removal became a final agency decision. 8 C.F.R. § 1003.39.

C. The Second Circuit's Consideration Of Valenzuela's Petition For Review

To obtain review in federal court of the Board's construction of the stop-time rule, Valenzuela filed a second habeas petition in the United States District Court for the Southern District of New York on October 10, 2003. The petition was later transferred to the United States Court of Appeals for the Second Circuit pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 311, and treated as a petition for review. Valenzuela argued that the Second Circuit "should reject the agency's interpretation announced by the *Perez* majority and adopt the interpretation of the provision at issue provided by the *Perez* [d]issent." Pet'r Br. at 27, *Valenzuela Grullon v. Ashcroft*, 509 F.3d 107 (2d Cir. 2007) (No. 05-4622). He also argued that the court should assume jurisdiction in spite of his failure to file an appeal with the Board because, *inter alia*, "[t]he issue raised by Mr. Valenzuela was so entirely

foreclosed by prior precedent, that in light of that precedent and in light of the streamlining procedures, there was no remedy 'as of right' with regard to that issue." *Id.* at 28, 49-53.

The Second Circuit did not reach the merits of Valenzuela's challenge to the Board's construction of the stop-time rule. Instead, relying on this Court's opinions in *Booth v. Churner*, 532 U.S. 731 (2001), and *Bowles v. Russell*, 127 S. Ct. 2360 (2007), the Second Circuit concluded that Valenzuela failed, for purposes of § 1252(d)(1), to exhaust the administrative remedies available to him as of right, because he did not present his challenge to the en banc decision in *Perez* in an appeal to the Board. Pet. App. 10a-16a. Accordingly, the Second Circuit dismissed Valenzuela's petition for lack of jurisdiction.

The Second Circuit acknowledged that the Board's "precedential decision" in *Perez* had "'definitively decided'" Valenzuela's stop-time argument against him. Pet. App. 11a. Nevertheless, the court held that an appeal to the Board was a remedy "available 'as of right'" within the meaning of § 1252(d)(1) because the Board "'ha[d] authority to act on the subject of the' appeal. *Id.* at 11a-12a. The court speculated that the Board "could have reconsidered the *Perez* holding *in banc*, or it could have certified the question to the Attorney General." *Id.* at 11a. Because the Board had "'authority to act on the subject of the [petition]'" *id.* (citing *Booth*, 532 U.S. at 736 n.4), the Second Circuit concluded that his failure to file an appeal with the Board barred the federal courts from considering his petition: "'That [Valenzuela]'s argument would likely have failed'" before the Board did not relieve him of the obligation to appeal to the Board. *Id.* (alteration in original).

The Second Circuit also rejected Valenzuela's argument that the streamlining regulations effectively removed whatever discretion the Board might otherwise be thought to have had to consider his arguments on the merits that the en banc decision in *Perez* was wrongly decided. The court pointed to paragraph 1003.1(e)(4)(i), which states that a panel member cannot affirm unless he or she determines "that the result reached in the decision under review was correct," and to a panel member's ability to refer an appeal to a panel when there is a "need to reverse the decision of an immigration judge or the Service," 8 C.F.R. § 1003.1(e)(6)(vi), as indicating that a panel member is free under the regulations to conclude that an IJ decision that followed a controlling en banc Board precedent has been incorrectly decided and warrants review. Pet. App. 11a-12a.

Finally, the court rejected Valenzuela's statutory argument, based on Ninth Circuit precedent, that an appeal to the Board was not a remedy available as of right within the meaning of 8 U.S.C. § 1252(d)(1). The court acknowledged that the statutory language here, which limits the remedies that must be exhausted to those "'available as of right,'" is different than the language considered in *Booth*, where the statute "spoke only of 'such administrative remedies as are available.'" Pet. App. 12a (emphasis omitted). Noting that the Ninth Circuit "has parsed these phrases to mean that a remedy is available 'as of right' . . . only if the remedy is not 'constrained by past adverse administrative decisions,'" the Second Circuit "reject[ed] the Ninth Circuit's interpretation." *Id.* (citing *Sun*, 370 F.3d at 941-42). Relying instead on this Court's decision in *Booth*, the panel observed "'[t]hat [Venezuela]'s argument would likely have failed'" before the Board, *id.* at 11a (alteration in

original) did not relieve him of the obligation to appeal because "a statutory requirement for exhausting 'remedies' necessarily entails exhausting 'processes[]'" rather than "'forms of relief.'" *Id.* at 13a (quoting *Booth*, 532 U.S. at 739). The Second Circuit therefore concluded that, because an appeal to the Board is an available "process" that an alien has a right to invoke, Valenzuela was "statutorily required to exercise that right before appealing to this Court." *Id.*

REASONS FOR GRANTING THE PETITION

The decision below creates an acknowledged conflict with the Ninth Circuit and an equally clear conflict with the Fifth Circuit over the requirements for administrative exhaustion under 8 U.S.C. § 1252(d)(1). Thus, three circuits in which two-thirds of all immigration cases are brought are split 2 to 1 over the question presented.[5] As the Second Circuit sees it, Section 1252(d)(1) requires an alien to present his claim on appeal to the Board, so long as the Board would be within its power to act on it, even if binding precedent forecloses the claim on the merits. The Fifth and Ninth Circuits see it differently. They do not require an appeal to the Board where prior Board or judicial precedent would compel the Board to reject the alien's appeal.

This Court should grant plenary review to provide a uniform construction of Section 1252(d)(1). The Board processes tens of thousands of appeals each year, and disposes of nearly all of them through summary affirmance by a single member. No useful

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[5] *See* Office of Planning & Analysis, U.S. Dep't of Justice, *EOIR Review FY2006: Statistical Yearbook* B3 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

purpose is served by construing the statute's requirement to exhaust "remedies available to the alien as of right" to mean that an alien must take an appeal of an IJ decision that regulations require a single member of the Board summarily to affirm. The Board's streamlining rules foreclose reconsideration of its previous decisions, and so appeals that ask the Board to reconsider prior decisions are not an administrative remedy available as of right.

Congress is free, of course, to impose a requirement that would place a pointless burden on both the alien and the Board. It could write a statute that requires aliens to file appeals whenever the Board's procedural rules permit them to do so, regardless of whether the rules require the Board to reconsider its prior precedents. But Section 1252(d)(1) does not require an alien to exhaust all administrative remedies that are merely available It expressly requires exhaustion only of administrative remedies available "as of right." Unlike the Second Circuit, the Fifth and Ninth Circuits have properly given content to the "as of right" restriction, requiring an appeal only where the alien would have a right, under existing Board and judicial precedent, to have the Board consider the legal issue the alien seeks to raise. Appeals that challenge established precedents, like motions for reconsideration or to re-open proceedings, at best provide an avenue for relief that is discretionary rather than a matter of right, because the Board is free to deny them without consideration of the legal issue the alien seeks to raise.

Establishing a uniform rule on exhaustion for legal issues on which the Board's review is constrained is important, because there are tens of thousands of appeals to the Board each year, and while the

streamlining regulations ease the Board's burdens in dealing with them, individuals continue to bear their burden and expense. Failing to comply with exhaustion requirements, even if due to an attorney's good faith misunderstanding over the requirements of Section 1252(d)(1), carries significant consequences, for it deprives an individual of the right to have a federal court review a removal order, and precludes a federal court from addressing even situations of manifest injustice. The Court should resolve this conflict now.

I.

The decision below conflicts with a line of cases in the Ninth Circuit concerning the scope of § 1252(d)(1)'s exhaustion requirement. *See, e.g., Sun*, 370 F.3d at 942; *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003); *Castro-Cortez v. INS*, 239 F.3d 1037, 1045 (9th Cir. 2001), *abrogated on other grounds, Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023-24 (9th Cir. 1992). The Second Circuit acknowledged a conflict with *Sun*, and *Sun* most clearly explains the Ninth Circuit's approach to exhaustion under Section 1252(d)(1).

In *Sun*, the INS initiated removal proceedings after the petitioner was convicted of an aggravated felony. The IJ issued an order of removal, finding petitioner ineligible for asylum or cancellation of removal. Sun waived his right to appeal, and filed a habeas petition. In response to the government's contention that he had failed to exhaust his administrative remedies under Section 1252(d)(1), Sun contended that no appeal was needed because his arguments

were foreclosed by a prior en banc Board decision. 370 F.3d at 941-42.

The Ninth Circuit first held that "§ 1252(d)(1) establishes a statutory administrative exhaustion requirement." *Id.* at 941. As a result, the requirement could not be excused based merely on a judicial conclusion of futility. *Id.*

Unlike the Second Circuit, however, the Ninth Circuit applied this Court's directive that "the doctrine of administrative exhaustion should be applied with a regard for the particular scheme at issue." *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). Focusing on the language of Section 1252(d)(1), and in particular on the limitation on exhaustion to those remedies available to the alien as of right, the Ninth Circuit held that an appeal per se is not automatically a remedy available as of right:

> [T]he statutory exhaustion requirement [of § 1252(d)(1)] applies only to those remedies not constrained by past adverse administrative decisions. To qualify as a remedy "available to the alien as of right" under § 1252(d)(1), a remedy must enable the agency to give unencumbered consideration to whether relief should be granted.

Sun, 370 F.3d at 941-42.

To the Ninth Circuit, an appeal foreclosed by an en banc Board decision is akin to a motion to reopen or reconsider a previous Board order. Each is a remedy that is not "available ... as of right" under § 1252(d)(1) because, "[w]hen the BIA receives ... a motion [to reopen], it need only consider whether to reopen its prior order, but it is not required to do so." *Id.* at 942 (quoting *Castro-Cortez*, 239 F.3d at 1045). *See also, e.g., Noriega-Lopez*, 335 F.3d at 881 ("[M]otions to

reconsider, like motions to reopen, are not 'remedies available ... as of right' within the meaning of 8 U.S.C. § 1252(d)(1).") (omission in original).

Similarly, the Ninth Circuit explained, "[s]ome issues may be so entirely foreclosed by prior BIA case law that no remedies are 'available ... as of right' with regard to them before IJs and the BIA." *Sun*, 370 F.3d at 942. Thus, "'where the agency's position on the question at issue appears already set, and it is very likely what the result of recourse to administrative remedies would be, such recourse would be futile and is not required.'" *Id.* at 942-43 (quoting *El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 747 (9th Cir. 1991)); *see also SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990). [6]

The conflict with *Sun* is particularly stark because the constraint at issue in both cases is the same – a precedential en banc decision by the Board. Had Valenzuela's petition been brought in the Ninth Circuit, it would have been heard on the merits.

The decision below also conflicts with the Fifth Circuit's construction of Section 1252(d)(1) in *Arce-Vences v. Mukasey*, 512 F.3d 167 (5th Cir. 2007). There, the INS had initiated removal proceedings

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[6] On the particular facts of *Sun*, the Ninth Circuit concluded that Sun had failed to exhaust his administrative remedies because prior Board case law had not foreclosed the issue Sun sought to raise. 370 F.3d at 944. The Ninth Circuit continues to follow the interpretation of Section 1252(d)(1) that *Sun* and its predecessors set forth. *Puga*, 488 F.3d at 815 (citing *Sun* for principle that motion to re-open is not a remedy available as of right under Section 1252(d)(1), and thus finding no jurisdictional bar to the appeal, but requiring as a prudential matter that petitioner's claim of ineffective assistance of counsel be presented first to the Board).

against a legal resident who pleaded guilty to possession of a controlled substance. The resident conceded he was removable, but argued that he was eligible for cancellation of removal given the timing of his conviction. The IJ rejected the argument and the Board affirmed.

On a petition for review in the Fifth Circuit, the resident renewed his prior argument about timing and added a new claim that, in light of this Court's intervening decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), his offense should not be considered an aggravated felony.

Acknowledging that "[t]he exhaustion requirement of § 1252(d)(1) operates as a jurisdictional bar to our review of unexhausted claims," *Arce-Vences*, 512 F.3d at 172, the Fifth Circuit nevertheless emphasized that Section 1252(d)(1) only required exhaustion of remedies that are available "as of right." *Id.* The Fifth Circuit construed this language to mean that "'exhaustion is not required when administrative remedies are inadequate.'" *Id.* (quoting *Ramirez-Osorio v. INS*, 745 F.2d 937, 939 (5th Cir. 1984) (motion to reopen is not a remedy "as of right")). Accordingly, the court held that its jurisdiction was "not precluded by an alien's failure to raise before the Board a claim that the Board has no power or authority to remedy." *Id.* (citing *Goonsuwan v. Ashcroft*, 252 F.3d 383, 389 (5th Cir. 2001) (motion to reopen generally not remedy "as of right")).

Applying that standard, the Fifth Circuit rejected the government's argument that the resident had failed to exhaust his remedies available as of right. The court found that the Board would have been constrained to reject the resident's argument under the Fifth Circuit's pre-*Lopez* decisions. *Id.* at 172. As a result, an appeal to the Board on that issue

afforded the resident no remedy "as of right." "[W]here Fifth Circuit precedent has directly addressed the status of the particular statute at issue and remains binding during all stages of proceedings before the Immigration Judge and the Board, our jurisdiction is not precluded by an alien's failure to argue to the contrary below." *Id.*

Here, the constraint on the Board's authority flows from the Board's own precedent rather than from decisions of a federal court. But the constraint is no less binding. Valenzuela's only argument on the merits is that the dissenters in *Perez*, rather than the majority, correctly construed the stop-time rule in section 240A(d)(1). Not only did the Board definitively lay that legal issue to rest in *Perez*, but the rules governing the Board's consideration of subsequent appeals deny any aliens access to further en banc review as of right. The decision to consider a case en banc is entirely discretionary,[7] and "shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions." 8 C.F.R. § 1003.1(a)(5).[8] En banc re-consideration of

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[7] The decision to refer a case to the Attorney General for review under Section 1003.1(h) is similarly discretionary, occurring only when the Attorney General or certain DHS officials "direct" such referral or when the Chairman or a majority of the Board "believe" that a case should be referred.

[8] In committing the decision to initiate en banc proceedings to a majority vote of the Board or the Chairman's direction, Section 1003.1(a)(5) parallels 28 U.S.C. § 46(c), which provides "'[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.'" *See Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S.

arguments made in dissent is therefore not available to an alien as of right.

Indeed, under the Board's streamlining regulations, Valenzuela's appeal would not have even reached a three-member panel, let alone en banc review. *Id.* § 1003.1(e). An appeal may be assigned to a three-member panel of the Board "only" under specific circumstances. *Id.* § 1003.1(e)(6); *Kambolli v. Gonzales*, 449 F.3d 454, 459 n.7 (2d Cir. 2006) ("The beginning of subsection (e) makes clear that unless a case meets an enumerated standard in subsection (e)(6), referral to a three-member panel is not allowed."). None of those circumstances is present here.[9]

Instead, the single Board member would have had no choice but to "affirm the decision ... without opinion" under Section 1003.1(e)(4). While the Second Circuit notes that the Board member would not have been compelled to affirm unless he or she concluded "that the result reached in the decision

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247, 257 n.18 (1953) (stating that 28 U.S.C. § 46(c) commits the power to initiate en banc proceedings to the courts of appeals).

[9] The en banc decision in *Perez* eliminated any "need to settle inconsistencies among the rulings of different immigration judges," 8 C.F.R. § 1003.1(e)(6)(i), mooted any "need to establish a precedent construing the meaning of" the stop time rule, *id.* § 1003.1(e)(6)(ii), and "resolve[d] a case or controversy of major national import" to the extent there was one. *Id.* § 1003.1(e)(6)(iv). The IJ's decision was concededly "in conformity with the ... applicable precedents," *id.* § 1003.1(e)(6)(iii), did not raise any "need to review a clearly erroneous factual determination by an immigration judge," *id.* § 1003.1(e)(6)(v). Finally, from the Board's perspective, there would have been no "need to reverse the decision of an immigration judge or the Service," *id.* § 1003.1(e)(6)(vi), because the IJ's decision followed existing Board precedent, and there was no decision of the Service at issue.

under review was correct," such a conclusion is inescapable when the legal issue is whether the IJ was correct in choosing to follow the majority, rather than the dissent, of an en banc precedential opinion. 8 C.F.R. § 1003.1(e)(4)(i).

In short, the Board would have been constrained by its own precedent and governing rules in Valenzuela's case just as tightly as it would have been bound by the Fifth Circuit's case law on aggravated felony in Arce-Vences's case. Had the Fifth Circuit applied its interpretation of Section 1252(d)(1) in *Arce-Vences* to Valenzuela's petition, it would have rejected the government's exhaustion claim.

II.

The conflict over the exhaustion requirement of Section 1252(d)(1) is an important rift that the Court should resolve now. The burden of filing fruitless appeals, purely to punch a ticket into federal court, is a heavy one, particularly for aliens. Immigration Courts in the states of the Second Circuit receive nearly thirty thousand new matters each year, all of which lead to final orders that are eligible for appeal to the Board and subject to petitions for review in the federal courts.[10] The Board has eased its own burden by adopting streamlining regulations that allow individual Board members to methodically affirm the many decisions that are controlled by existing Board precedent. But the same streamlining is not available to individuals facing removal. Individuals who want to petition the federal courts for review still incur the delay and expense of pursuing an

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[10] *See* Office of Planning & Analysis, U.S. Dep't of Justice, *EOIR Review FY2006: Statistical Yearbook* B3 (2007).

administrative appeal that is foreclosed by Board precedent; they still have to present their appeal clearly and amply to the Board, even though the Board need only summarily affirm the IJ's decision. If that burden on aliens is being wrongly imposed, then it should be removed forthwith.

The petition also should be granted because the problems of a lack of uniformity and clarity are particularly acute in the area of exhaustion. Were this Court to delay resolution of this conflict, individuals with unlimited time and resources might wisely choose to pursue a scorched earth approach to ensure that the requisites of Section 1252(d)(1) are met. But many aliens lack unlimited resources, and they and their counsel must make educated guesses – or less than educated, if they do not canvass and weigh the differing standards in the various circuits – as to how much exhaustion is enough. Such guesswork, when incorrect, will have serious consequences. An alien will lose his or her only opportunity to invoke the review of federal courts on an issue of federal law that may determine whether the alien remains in the United States.

This Court's recent decision in *Bowles v. Russell* underscored just how important it is for the federal courts to correctly draw the lines that limit their jurisdiction. Because federal courts have "no authority to create equitable exceptions to jurisdictional requirements," they may not cushion the inequitable consequences of even a justifiable failure to comply with jurisdictional prerequisites. 127 S. Ct. at 2366; *see id.* at 2368, 2371-72 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("The stakes are high in treating ... limits as jurisdictional" because "if a limit is taken to be jurisdictional, waiver becomes impossible [and] meritorious excuse irrele-

vant.") The decision below illustrates this point, because the Court of Appeals, having determined that it lacked jurisdiction due to the failure to exhaust administrative remedies, was obliged to reject petitioner's claim of "manifest injustice" out of hand. Pet. App. 15a-16a. False negatives in the area of jurisdiction thus carry a heavy cost, because courts that refuse jurisdiction will be unable to manage the equities of individual cases until this Court resolves the issue.

There is ample reason to suspect that the Second Circuit (at 12a-13a) did not correctly draw the jurisdictional line that Congress set in Section 1252(d)(1). The court purported to preserve a distinction between purely discretionary remedies, such as motions for reconsideration or to reopen, and appeals that are foreclosed by binding Board precedent. Pet. App. 14a. But the streamlining rules eliminate any principled distinction between them. The discretion that the Board would have to reject an appeal by Valenzuela challenging *Perez* is no less than it would have to reject a motion for reconsideration by Perez himself in the original case. Both would be filings the alien has a right to file under the rules, but both would at most trigger discretionary review; neither constitutes a remedy available as of right. The Fifth and Ninth Circuit recognize this distinction, and therefore properly look beyond the alien's right to file an appeal in deciding the requisites of exhaustion under § 1252(d)(1).

The Second Circuit also erred in construing Section 1252(d)(1) in accordance with this Court's construction of the substantially different statutory language of the Prison Litigation Reform Act in *Booth v. Churner*, 532 U.S. 731 (2001). The Court held that, under 42 U.S.C. § 1997e(a), an inmate must exhaust

such remedies as are available, even if some forms of relief, such as money damages, are not available through the administrative process. Key to the Court's holding was the statutory language, that "no action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted," and its history, in which Congress had removed certain qualifiers the Court had previously relied upon to hold that a prisoner seeking only money damages need not exhaust administrative remedies. *Booth*, 532 U.S. at 740.

No such open-ended language, or confining history, is present here. To the contrary, the statutory language invites a distinction between remedies that are "available" (*Booth*) and those that are available only "as of right;" the latter excludes remedies that are merely "discretionary." This Court has repeatedly recognized the discretionary nature of certain relief available from the Board. For example, the Court has noted that "[t]he granting of a motion to reopen is discretionary." *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984)). In *INS v. Jong Ha Wang*, 450 U.S. 139, 143 (1981), this Court explained that the regulation governing a motion to reopen "is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition." It is undisputed, even by the panel below, that a single Board member could not provide a remedy to Valenzuela. Yet the regulations governing the Board's en banc consideration, and referral to a three-member panel are framed in the same "negative" manner, foreclosing review except when certain circumstances are met, or

permitting it at the discretion of the Board. Because obtaining en banc reconsideration of a prior Board decision is just as "discretionary" as a motion to reopen, neither should be deemed a remedy available "as of right." *See, e.g., Northwest Env't Advocates v. EPA*, 340 F.3d 853, 854 (9th Cir. 2003) (Kleinfeld, J., dissenting) ("The rarely exercised certiorari jurisdiction of the Supreme Court is not an adequate substitute for an appeal as of right.")[11]

The Second Circuit's rule serves neither the interests of Congress, the Board, nor aliens. Nor will it improve the quality of review in the federal courts. In upholding the streamlining regulations against challenges that they eviscerated meaningful appellate review by the Board, the courts of appeals have noted that meaningful review by the Board is unnecessary, because the IJ's decision and supporting record "permit[] a court to carry out an intelligent review."[12] The DOJ ought not be permitted, on the

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[11] The Second Circuit's construction of Section 1252(d)(1) also runs afoul of the rule of lenity, a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Under the rule of lenity, when a limitation on relief from removal is ambiguous, it must be afforded the narrower meaning. *Id.* at 449-50. Given the drastic consequences of deportation or removal, Congress must speak clearly and definitely before courts apply a bar to relief from removal. *See INS v. Errico*, 385 U.S. 214, 225 (1966) (construing section 241(f) of the Act, 8 U.S.C. § 1251(f) (1964), and indicating that doubts as to the correct construction of the statute affording relief from deportation should be resolved in the alien's favor); *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (stating that any doubts regarding the construction of the Act are to be resolved in the alien's favor).

[12] *Albathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003); *see also Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003)

one hand, to offer many aliens only a discretionary and highly contingent appellate review within the agency, and then simultaneously to label such review a "remedy available as of right" in order to bar the federal courts from reviewing judgments of law that the Board has already fully considered and rendered. The Board has evaluated and definitively construed the stop-time rule. Valenzuela properly invoked the jurisdiction of the federal courts to review that ruling. Access to the federal courts should be protected as zealously when Congress has granted it, as it is denied when Congress has withheld it. This Court should grant the petition, and restore the jurisdictional line for review of final orders of removal that Congress originally drew.

("The streamlining procedures do not compromise our ability to review the INS's decision, to the extent we have jurisdiction to do so, because we can review the IJ's decision directly.") *Cf. Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003) ("Since we can review directly the decision of the IJ when a case comes to us from the BIA pursuant to 1003.1(a)(7), our ability to conduct a full and fair appraisal of the petitioner's case is not compromised."); *Guentchev v. INS*, 77 F.3d 1036, 1037-38 (7th Cir. 1996) ("The Attorney General could dispense with the Board and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review.... The combination of a reasoned decision by an administrative law judge plus review in a United States Court of Appeals satisfies constitutional requirements.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BOZENA ZIEDALSKI
350 Fifth Ave, Suite 1729
New York, NY 10118
(212) 629-0454

MARK E. HADDAD*
ROBERT A. HOLLAND
SETH M. GOLDSTEIN
HOLLY L. HENDERSON
MAYA R. RUPERT
SIDLEY AUSTIN LLP
555 W Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

April 15, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 05-4622-ag

JULIO CESAR VALENZUELA GRULLON,
Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General,* MICHAEL J. GARCIA, EDWARD J. MCELROY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondents.

Argued: Aug. 30, 2007
Decided: Nov. 27, 2007
As Amended Jan 7, 2008

Before: JACOBS, Chief Judge, B.D. PARKER and HALL, *Circuit Judges*.

DENNIS JACOBS, *Chief Judge*:

Julio Cesar Valenzuela Grullon ("Valenzuela") petitions for review of an order of Immigration Judge ("IJ") John Opaciuch denying his application for cancellation of removal. Valenzuela, who failed to appeal the order of removal to the Board of Immigration

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General John Ashcroft as respondent in this case.

Appeals ("BIA"), concedes that his administrative remedies are therefore unexhausted, but asks that the failure to exhaust be excused (and that we reach the merits of his petition). We hold that the exhaustion requirement applicable to Valenzuela's petition, 8 U.S.C. § 1252(d)(1), is statutory and jurisdictional. Further, we conclude that the jurisdictional defect cannot be excused on a ground of manifest injustice. *Contra Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir.2004).

I

On December 5, 1994, Valenzuela was admitted as a lawful permanent resident from his native Dominican Republic. In December 2001, he was indicted in New York on a series of drug offenses, and pled to a single count in February 2002. He was sentenced to a term of three years to life in prison.

One month before his October 2002 release on parole, the INS charged Valenzuela with violating a law related to a controlled substance. *See* 8 U.S.C. § 1227(a)(2)(B)(i).[1] Upon his parole, Valenzuela was detained by the INS. In December 2002, he filed a petition for habeas corpus in the Southern District of New York, arguing that detention without bond prior to his removal proceedings was unconstitutional. The district court (Griesa, J.) granted the petition on December 20, 2002, and Valenzuela was released. The government's appeal of that ruling became moot when Valenzuela's removal proceedings were com-

[1] The government also alleged initially that Valenzuela had committed an aggravated felony, *see* 8 U.S.C. § 1227(a)(2)(A)(iii), but later withdrew that basis for removal.

pleted, we therefore vacated the district court's order.[2]

Throughout his removal proceedings, conducted in the spring of 2003, Valenzuela conceded removability but sought cancellation of removal. In order to establish that he has continuously resided in the U.S. for seven years—a prerequisite to cancellation of removal, *see* 8 U.S.C. § 1229b(a)(2)—Valenzuela would have had to overcome the "stop-time" rule, which provides that "any period of continuous residence . . . shall be deemed to end . . . when the alien has committed an offense . . . that renders the alien inadmissible to the United States." 8 U.S.C. § 1229b(d)(1)(B). Valenzuela argued that the stop-time rule does not terminate a period of continuous residence until the alien is *convicted* of the removable offense—a consequential distinction for Valenzuela because he pled guilty a few months after the December 2001 expiration of the seven-year period, whereas the indictment alleged that the offense was committed on or about August 29, 2001.[3]

The BIA had already rejected Valenzuela's proposed reading at the time of his hearing before the IJ, *see In re Perez*, 22 I. & N. Dec. 689 (BIA 1999) (11-4 decision *in banc*), but Valenzuela urged the IJ to follow the reasoning of the *Perez* dissent.

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[2] Both parties note that the rationale for the district court's habeas ruling was in any event subsequently rejected by the Supreme Court in *Demore v. Hyung Joon Kim*, 538 U.S. 510, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003).

[3] Valenzuela's brief professes uncertainty as to the precise date he committed the offense to which he pled guilty. He concedes, however, that the date of his *arrest*—November 29, 2001—fell within the seven-year period following his admission to the United States.

The IJ denied relief in August 2003.[4] Rather than appeal to the BIA, Valenzuela filed a second habeas petition in October 2003 to challenge the order of removal. This habeas petition was pending in the Southern District of New York when the REAL ID Act of 2005, Pub.L. No. 109-13, 119 Stat. 231, 311 (2005), took effect on May 11, 2005. Pursuant to Section 106(c) of that Act, the district court ordered the habeas corpus petition transferred to this Court, where it was docketed as a petition for review.

Valenzuela concedes his failure to exhaust administrative remedies before petitioning this Court for review, but he contends that any failure to exhaust should be excused because (1) appeal to the BIA would have been futile, (2) his appeal raises constitutional claims, and (3) dismissing his petition would cause a "manifest injustice." On the merits, Valenzuela argues that the stop-time rule is ambiguous as to whether continuous residence is terminated by *commission* of an offense or by *conviction*, and that the *Perez* dissent correctly concluded that the trigger is conviction.

The government urges us to dismiss the petition for review on exhaustion grounds because Valenzuela never appealed to the BIA. On the merits, the government defends the BIA's interpretation of the stop-time rule in *Perez* as consistent with the plain language of the statute and argues that Valenzuela is therefore barred from applying for cancellation of removal.

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[4] We do not know the actual grounds for the order of removal because the oral decision is not included in the record on this appeal (a consequence of Valenzuela's failure to appeal to the BIA, discussed below); in all likelihood, however, one ground was *Perez*.

II

When the REAL ID Act of 2005, Pub.L. No. 109-13, 119 Stat. 231, 311 (2005), became effective, Valenzuela's second habeas petition (challenging his order of removal), then pending in the Southern District of New York, was transferred to this Court and converted into a petition for review:

> If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal . . . is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case . . . to the court of appeals for the circuit in which a petition for review could have been properly filed . . . .

§ 106(c), 119 Stat. at 311; *see also Marquez-Almanzar v. INS*, 418 F.3d 210, 215 (2d Cir.2005). The REAL ID Act speaks generally to the manner in which converted petitions are to be treated upon transfer here:

> The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section shall not apply.

§ 106(c), 119 Stat. at 311. In other words, converted petitions are to be treated as ordinary petitions for review in all respects except as to the filing deadline (8 U.S.C. § 1252(b)(1)).

The question, then, is whether Valenzuela's converted petition is governed by 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right"), or whether the sole exhaustion rule Valenzuela violated

is a "judicial (common-law) [rule], [which is] discretionary and includes a number of exceptions[,]" *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir.2003).

We have not had occasion to decide whether § 1252(d) requires that aliens appeal to the BIA before petitioning this Court for review. But our jurisprudence makes that supposition. For example, we dismissed a habeas appeal in a case that had never been before the BIA, holding that the "limitations imposed by § 1252(d) on a court's ability to 'review' final orders of deportation extend[ed] to habeas corpus review." *Theodoropoulos v. INS*, 358 F.3d 162, 170 (2d Cir.2004); *see also Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 118 (2d Cir.2006) ("[W]e have jurisdiction to review the 'final order of removal' entered against Lin, so long as a decision has been rendered on his application by an IJ and appealed to the BIA—the two administrative remedies available to him as of right."); *cf. Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir.2004) ("We therefore hold that, notwithstanding a habeas petitioner's failure to exhaust his claims before the BIA, as required by section 1252(d), *we nonetheless have jurisdiction* to consider the petitioner's claim *if it is necessary to avoid manifest injustice.*" (emphasis added)).

Squarely presented with the issue for the first time in this appeal, we hold that the exhaustion provision of § 1252(d)(1) requires aliens, *inter alia*, to appeal to the BIA before petitioning for review in this Court.

III

The next question is whether the statutory exhaustion requirement of § 1252(d)(1)—that a court may review a final order of removal only if the alien has exhausted all administrative remedies available

to him as of right—is jurisdictional or merely "mandatory."[5] *See Lin Zhong*, 480 F.3d at 119. Mandatory requirements (we have said) are subject to waiver, *id.*, and are therefore less absolute than jurisdictional requirements.

In *Lin Zhong*, 480 F.3d at 119-20, we distinguished between jurisdictional and mandatory rules, partly by resort to the Supreme Court's caveat that

> [c]larity would be facilitated . . . if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Eberhart v. United States, 546 U.S. 12, 16, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (internal quotation marks and citation omitted). Subsequent to *Lin Zhong*, the Supreme Court sharpened the analysis. In *Bowles v. Russell*, --- U.S. ----, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), the Court held that a limit on extensions of time to appeal, *see* 28 U.S.C. § 2107(c), was jurisdictional largely because "of the fact that [the] time limitation is set forth in a statute." *Bowles*, 127 S.Ct. at 2364. The Court explained:

> Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. Put another way, the notion of

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[5] We need not deal here with the third category of exhaustion requirements—those that are judge-made, prudential rules of administrative law—because we hold that the exhaustion requirement that governs Valenzuela's petition is statutory. *See* Part II, *supra*.

> "subject-matter" jurisdiction obviously extends to "classes of cases . . . falling within a court's adjudicatory authority," but it is no less "jurisdictional" when Congress forbids federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.

Id. at 2365-66 (citations omitted). *Bowles* emphasized repeatedly that its reasoning was based on the statutory origin of the limitation, and thus made clear that limits expressed in statutes—as to time or "classes of cases"—limit subject-matter jurisdiction. *See, e.g., id.* at 2366 ("As we have long held, when an appeal has not been prosecuted *in the manner directed*, within the time limited *by the acts of Congress*, it must be dismissed for want of jurisdiction." (internal quotation marks omitted) (emphasis added)); *id.* at 2365 (observing that the Supreme Court's treatment of its certiorari jurisdiction "also demonstrates the jurisdictional distinction between court-promulgated rules and limits enacted by Congress").

Congress cast § 1252(d)(1) in terms of the courts' authority to review a "class of cases" (petitions for review of a final order of removal) and permitted review "only if the alien has exhausted all administrative remedies available as of right." One of the administrative remedies available to aliens as of right is an appeal to the BIA. In this way, Congress has instructed the courts that they may not review a final order of removal unless the alien has appealed to the BIA. When an exhaustion requirement is statutory and envinces an intent to constrict the ability of courts to adjudicate a class of cases, the limitation is jurisdictional, rather than mandatory only. The requirement might be described as a "claim-processing rule"; but because it is a *statutory* limit on the Court's

power, it is jurisdictional, not merely mandatory. *Accord Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir.2007) (citing *Bowles* and holding that the 30-day time period for filing a petition for review is "mandatory and jurisdictional because it is imposed by statute" (internal citation omitted)).

We therefore hold that, as regards the requirement that petitioners appeal to the BIA, § 1252(d)(1) is jurisdictional. We have said as much in dicta. *See Lin Zhong*, 480 F.3d at 107 (referring to "the clearly jurisdictional requirement of 8 U.S.C. § 1252(d)(1) that cases of this sort be brought to the Executive Office for Immigration Review (i.e., an IJ and the BIA) before they can be considered by courts of appeal"); *accord Lin Zhong v. U.S. Dep't of Justice*, 489 F.3d 126, 130 (2d Cir.2007) (Calabresi, J., concurring in the denial of *in banc* review) (observing that § 1252(d)(1) uses "language [that] typically means that courts do not have jurisdiction to hear a petitioner who has not first brought his case before the available administrative agency").

Given that we are directed by statute to treat converted petitions, such as Valenzuela's, as ordinary petitions for review, it follows that such converted petitions are likewise subject to § 1252(d)'s jurisdictional bar.

IV

We are left to decide what exceptions, if any, would allow us to hurdle the jurisdictional bar that prevents us from reviewing the merits of Valenzuela's petition.

A. Futility

Valenzuela argues that appealing to the BIA would have been futile in light of the agency's precedential

decision, *In re Perez*, 22 I. & N. Dec. 689 (BIA 1999). As the Supreme Court explained in *Booth v. Churner*," we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." 532 U.S. 731, 741 n. 6, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). At the same time,

> *Booth* does allow that exhaustion may not be required "where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint," because "[w]ithout the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." This may technically be less an "exception" to a statutory exhaustion requirement than it is a statement regarding the parameters of that requirement.

Beharry v. Ashcroft, 329 F.3d 51, 58 (2d Cir.2003) (internal citations omitted). *Booth* applies in the immigration context.[6]

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[6] Valenzuela cites dicta in *Gill v. INS*, 420 F.3d 82 (2d Cir.2005), for the proposition that *Booth*'s rule against futility exceptions does not operate in the immigration context because *Booth* was "based on the legislative history of the [Prison Litigation Reform Act], and in particular Congress's decision to *eliminate* previously-available statutory exceptions for futility." *Gill*, 420 F.3d at 87 n. 9. Of course, *Gill*'s dicta runs counter to the reading of *Booth* set out in *Beharry*. Moreover, our own reading of *Booth* suggests that it is not limited to those circumstances in which the statutory history indicates that Congress took away a previously existing futility exception. *See Booth*, 532 U.S. at 739, 121 S.Ct. 1819 (referring to statutory history as one of two considerations leading to the Court's holding). Such statutory history may counsel strict adherence to the congres-

Valenzuela's futility argument fails because he cannot demonstrate that the BIA was unable to provide the relief that he sought. The BIA could have reconsidered the *Perez* holding *in banc*, or it could have certified the question to the Attorney General. *See* 8 C.F.R. § 1003.1(g); *see also Theodoropoulos v. INS*, 358 F.3d 162, 173 (2d Cir.2004) (observing that even though the Attorney General had issued a precedential opinion on the question, the BIA could have sent it back up to him). Valenzuela confuses the likelihood of adherence to precedent with the factual impossibility of relief: "it cannot be said that the IJ and the BIA do not 'have authority to act on the subject of the [petition], leaving [Valenzuela] with nothing to exhaust.'" *Beharry*, 329 F.3d at 59 (citing *Booth*, 532 U.S. at 736 n. 4, 121 S.Ct. 1819); *accord Duvall v. Elwood*, 336 F.3d 228, 234 (3d Cir.2003) (even though the BIA had already "definitively decided" the question in a precedential decision, "§ 1252(d)(1)[ ] requires exhaustion as a matter of jurisdiction"). "That [Valenzuela]'s argument would likely have failed is not tantamount to stating that it would have been futile to raise it." *Beharry*, 329 F.3d at 62.

Taking a different tack, Valenzuela argues that regulations requiring any BIA member assigned his case to "streamline" the appeal would have prevented that Board member from referring the appeal to a three-member panel or to an *in banc* panel of the BIA. But the regulation (set out in the margin[7]),

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sional command, but we are bound to implement congressional limits on our jurisdiction without reference to particular features of statutory history.

[7] "Affirmance without opinion. (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member

specifically provided that a single board member could have affirmed without opinion only if he or she "determine[d] that the result reached in the decision under review was correct." 8 C.F.R. § 1003.1(e)(4)(i). Moreover, as Valenzuela concedes, the regulations specify that one circumstance in which appeals may be assigned to a panel is when there is a "need to reverse the decision of an immigration judge or the Service." 8 C.F.R. § 1003.1(e)(6)(vi).

Last, Valenzuela observes that § 1252(d)(1) requires only the exhaustion of "administrative remedies available as *of right*," whereas the exhaustion statute in *Booth* spoke only of "such administrative remedies *as are available*." The Ninth Circuit has parsed these phrases to mean that a remedy is available "as of right" within the meaning of § 1252(d)(1) only if the remedy is not "constrained by past adverse administrative decisions." *Sun v. Ashcroft*, 370 F.3d 932, 941-42 (9th Cir.2004). We reject the Ninth Circuit's interpretation. The term "as of right" in § 1252(d)(1) excuses pursuit only of such remedies as are wholly discretionary. *See Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir.1994) ("[T]he failure to move to reopen does not preclude jurisdiction

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determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

> (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or
>
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case."

8 CFR § 1003.1(e)(4).

because . . . [it] is a discretionary remedy."). As the Supreme Court has explained, a statutory requirement for exhausting "remedies" necessarily entails exhausting "processes." *See Booth*, 532 U.S. at 739, 121 S.Ct. 1819 ("[O]ne 'exhausts' processes, not forms of relief. . . .").

Valenzuela had a right to appeal the IJ's order of removal to the BIA. And he was statutorily required to exercise that right before appealing to this Court, notwithstanding his small chance of success. *See Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 118 (2d Cir.2006) ("[I]n the context of [the alien's] . . . claims, we have jurisdiction . . . so long as a decision has been rendered on his application by an IJ and appealed to the BIA—*the two administrative remedies available to him as of right.*" (emphasis added)).

B. Constitutional Claim

Valenzuela argues that his petition is not subject to statutory exhaustion requirements because it presents constitutional claims. The supposed constitutional argument is that the IJ violated Valenzuela's Due Process rights by misconstruing the stop-time rule to end his period of continuous residence when he *committed* the crime, as opposed to when he was *convicted*.

Even if the IJ's interpretation of the stop-time rule were incorrect, such an error would not be a constitutional violation. Accordingly, this is not a constitutional claim. Valenzuela is simply arguing that the IJ erroneously interpreted a statute in such a way that made him legally ineligible for discretionary cancellation of removal. We therefore do not reach the issue of whether there exists a constitutional claim exception to § 1252(d).

C. "Manifest Injustice"

Last, Valenzuela argues that we should excuse his failure to exhaust under the "manifest injustice" exception to the exhaustion requirement. *See Marrero Pichardo v. Ashcroft*, 374 F.3d 46 (2d Cir.2004). Our circuit law has made this exception available "even when exhaustion is a jurisdictional matter." *Lin Zhong*, 480 F.3d at 107 n. 1.

In *Marrero Pichardo*, it was deemed manifest injustice to remove a petitioner because: (1) he had resided in the U.S. for 26 years, (2) he had a wife and daughter in the U.S., (3) he claimed to have no ties to his native Dominican Republic, (4) he had appeared *pro se* before the IJ, and (5) the law had recently changed in the petitioner's favor (such that none of his eleven drunk driving convictions would be considered crimes of violence). 374 F.3d at 54. Valenzuela can cite comparable equities. He has resided in the U.S. for 13 years with his sister and mother, from whom he would be separated if deported; he was engaged to an American citizen who was carrying his child, at least as of 2003; he came here as a teenager and says he has "adopted" the United States as his home country; and his behavior—after his parole—was "exemplary." Although Valenzuela had counsel before the IJ, he claims that his counsel failed to inform him of the immigration consequences of pleading guilty.[8]

We noted that the intervening change in law in Marrero Pichardo's favor was not "collateral," but rather went to "the very basis of his deportation." *Id.* at 54. As to Valenzuela, there was no intervening

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[8] Valenzuela unsuccessfully petitioned a New York state court in 2003 to vacate his conviction on this ground.

change in law pertaining to his removability: Valenzuela challenges the correctness of the BIA's decision in *Perez*, which goes "to the very basis of his deportation," but *Perez* has not been overruled by the BIA or by this Court. Valenzuela instead cites an intervening change in the law affecting the government's ability to detain him pending removal.[9] Valenzuela's argument based on a change of law thus does not neatly mirror the facts of *Marrero Pichardo*, although Valenzuela can claim the higher ground of having committed one offense instead of eleven. But, given that we have been willing to accept even an opinion from another circuit as a sufficient intervening change in law to assert "manifest injustice," *see Gill v. INS*, 420 F.3d 82, 88 (2d Cir.2005), Valenzuela would have a plausible claim to dispensation for "manifest injustice" if we were to uphold that exception to § 1252(d)'s exhaustion requirement.

In light of the Supreme Court's recent opinion in *Bowles v. Russell*, --- U.S. ----, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), we hold that there is no "manifest injustice" exception to § 1252(d)'s exhaustion require-

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[9] Specifically, before the IJ ordered Valenzuela removed in August 2003, the Supreme Court upheld as constitutional pre-removal detention of criminal aliens. *See Demore v. Hyung Joon Kim*, 538 U.S. 510, 531, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003). Valenzuela notes that ICE then issued a memorandum stating that all persons within *Demore*'s scope would be called in for interviews, and presumably for detention. His argument is thus that an appeal to the BIA would have somehow increased the likelihood that he would be re-detained. Even assuming (as we do not) that such an anxiety could excuse a failure to appeal, it is unclear why Valenzuela did not fear re-detention when he appeared before the IJ at his master calendar hearings in May and August of 2003—both of which took place after the Supreme Court issued its *Demore* opinion in April of that year—or when he filed his second habeas petition.

ment.[10] Insofar as our earlier opinions have held to the contrary, those opinions are overruled.[11]

In *Bowles*, the Supreme Court considered the applicability of the "unique circumstances" exception to the jurisdictional deadline for filing a notice of appeal. *See Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962); *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964). The *Bowles* Court laid the exception to rest: "Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate." 127 S.Ct. at 2366.

Just as this analysis invalidates the "unique circumstances" exception to the jurisdictional bar created by the filing deadline at issue in *Bowles*, it likewise invalidates the "manifest injustice" exception to the jurisdictional bar created by 8 U.S.C. § 1252(d)'s exhaustion requirement. *Bowles* broadly disclaims the "authority" of the federal courts "to create equitable exceptions to jurisdictional requirements." *Id.*

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[10] At the direction of the Court, the parties submitted additional briefing on whether *Bowles*, which was filed after the parties submitted briefs, had any impact on this case.

[11] In *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 2068, 165 L.Ed.2d 1 (2006), the Supreme Court recently reaffirmed that "[i]n certain exceptional cases involving a compelling claim of actual innocence," "the state procedural default rule is not a bar to a federal habeas corpus petition." The "actual innocence" exception is unaffected by *Bowles* because "actual innocence" is an exception to a judge-made rule, while *Bowles* overrules exceptions to any jurisdictional rule made by Congress, such as is at issue here.

CONCLUSION

We have considered the parties' remaining arguments and find each of them to be without merit. For the foregoing reasons, Valenzuela's petition is dismissed for lack of jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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03 Civ. 8039 (TPG)

JULIO CESAR VALENZUELA GRULLON,
Plaintiff,

against

JOHN ASHCROFT, Attorney General, et al,
Defendants.

ORDER

Pursuant to the REAL ID Act of 2005, §§ 106(a) and 106(c), this petition is transferred to the United States Court of Appeals for the Second Circuit. *See*, *Marquez-Almanzar v. INS*, 2005 WL 1864071, at *1 (2d Cir. Aug. 8, 2005).

A copy of this order is being served upon Bozena Ziedalski, Esq., attorney for petitioner and also upon Assistant United States Attorney Michael Holden.

SO ORDERED.

Dated: New York, New York
August 25, 2005

/s/ Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX C

IMMIGRATION COURT
26 FEDERAL PLZ 12TH FL., RM1237
NEW YORK, NY 10278

Case No.: A44-923-256

In the Matter of

VALENZUELA GRULLON, JULIO CESAR
Respondent.

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Aug. 21, 2003. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[✓] The respondent was ordered removed from the United States to the Dominican Republic or in the alternative to _____

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternate order of removal to _____

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn

[✓] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) (✓) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration. Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: Aug. 21, 2003
Appeal: Waived, Reserved Appeal Due By: 9/22/03

/s/ John Opacioch
JOHN OPACIOCH
Immigration Judge

MGP

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FILED
JUL 9 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1310

In the Supreme Court of the United States

JULIO CESAR VALENZUELA GRULLON, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
DONALD E. KEENER
M. JOCELYN LOPEZ WRIGHT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an alien who has been ordered removed by an immigration judge must exhaust administrative remedies, as required by 8 U.S.C. 1252(d)(1), by appealing to the Board of Immigration Appeals before petitioning for judicial review of the removal order in the federal courts of appeals, when the alien's legal argument is foreclosed by a prior decision of the Board sitting en banc.

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In the Supreme Court of the United States

No. 07-1310

JULIO CESAR VALENZUELA GRULLON, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 509 F.3d 107.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2008. On February 13, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 26, 2008. On March 18, 2008, Justice Ginsburg further extended that time to April 15, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 237 of the Immigration and Nationality Act (INA), 8 U.S.C. 1227, provides that several classes of aliens are subject to removal, including those who "ha[ve] been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance * * *, other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i). The Department of Homeland Security (DHS)—or, before March 1, 2003, the former Immigration and Naturalization Service (INS)[1]—may formally charge an alien with removability under Section 237(a) by issuing a notice to appear. 8 U.S.C. 1229a(a)(1); 8 C.F.R. 239.1(a). Removal proceedings commence when DHS files the notice with the immigration court. 8 C.F.R. 1003.14(a), 1239.1(a).

In a removal proceeding conducted by an immigration judge, an alien may apply for any relief from removal for which he considers himself eligible. 8 C.F.R. 1240.1, 1240.11. Section 240A(a) of the INA provides the Attorney General with discretion to cancel the removal of an alien who:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and

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[1] On March 1, 2003, INS was abolished and many of its functions were transferred to the newly created DHS. See 6 U.S.C. 251, 271(b), 291.

(3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a). Section 240A(d) sets forth rules for computing the time of continuous residence, including the so-called "stop-time rule":

> **(1) Termination of continuous period**
>
> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) * * * when the alien is served a notice to appear under section 1229(a) of this title, or (B) *when the alien has committed an offense* referred to in section 1182(a)(2) of this title that renders the alien * * * removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1) (emphasis added). An application for cancellation of removal may be "filed only with the Immigration Court after jurisdiction has vested pursuant to [8 C.F.R.] 1003.14." 8 C.F.R. 1103.7, 1240.20(b).

After a merits hearing, the immigration judge issues either an oral or written decision on the alien's removability and eligibility for relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a). If the immigration judge enters an order of removal, the statute requires the immigration judge to "inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties." 8 U.S.C. 1229a(c)(5).

b. The Board of Immigration Appeals (Board) hears appeals from decisions of immigration judges. 8 C.F.R. 1003.1, 1240.15. Regulations direct that, with exceptions not pertinent here, a decision appealed to the Board

"shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending." 8 C.F.R. 1003.6(a). Under the statute, a removal order "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. 1101(a)(47)(B); see also 8 C.F.R. 1003.39.

c. The INA also includes a detailed scheme for judicial review of final orders of removal. Under Section 242(d), a court "may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d). As originally enacted in 1996, Section 242 barred court of appeals jurisdiction to review removal orders entered against certain classes of criminal aliens, including those convicted of controlled-substance-related offenses. 8 U.S.C. 1252(a)(2)(C) (2000). As a result, many criminal aliens filed petitions for habeas corpus in federal district courts. Congress, however, eliminated habeas corpus review of final orders of removal in Section 106(a) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 310. Now, the sole means of obtaining judicial review of a final order of removal is through a petition for review in a court of appeals. 8 U.S.C. 1252(a)(5). That section further provides that an alien whose criminal conviction previously operated to preclude judicial review of an order of removal by way of a petition for review may now obtain "review of constitutional claims or questions of law" by means of such a petition. 8 U.S.C. 1252(a)(2)(D).

Section 106(c) of the REAL ID Act specifically addressed habeas petitions that challenge "a final administrative order of removal, deportation, or exclusion" and were "pending in a district court on" the date of its enactment. 119 Stat. 311 (8 U.S.C. 1252 note). In such a situation, "the district court shall transfer the case * * * to the court of appeals for the circuit in which a petition for review could have been properly filed." *Ibid.* Following the transfer, "[t]he court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under [8 U.S.C. 1252]," with the exception that the alien is not subject to the usual 30-day filing deadline contained in 8 U.S.C. 1252(b)(1). *Ibid.*

2. a. Petitioner, a native and citizen of the Dominican Republic, was admitted to the United States on December 5, 1994, as a lawful permanent resident. Pet. App. 2a. He was arrested on November 29, 2001, and was indicted the following month on a series of drug offenses. *Id.* at 2a, 3a n.3. In February 2002, he pleaded guilty to a single count relating to an offense committed on or about August 29, 2001, and was sentenced to three years' imprisonment. *Id.* at 2a, 3a. When he committed the offense to which he pleaded guilty (and when he was arrested), petitioner had not yet accrued seven years of continuous residence in the United States.

b. In September 2002, the former INS commenced removal proceedings and directed petitioner to appear before an immigration judge to answer the charge that he was subject to removal on the basis of his controlled-substance-related conviction. Pet. App. 2a. One month later, upon his release on parole from state custody, the INS detained petitioner under the authority of 8 U.S.C. 1226(c). *Ibid.* Petitioner filed a habeas corpus petition

challenging the constitutionality of his pre-order immigration detention, which was granted by the United States District Court for the Southern District of New York on December 20, 2002. *Ibid.* The government released petitioner as directed but appealed the district court's order to the Second Circuit. *Ibid.* The court of appeals later dismissed that appeal as moot because petitioner's removal proceedings were completed, and also vacated the district court's order in view of this Court's intervening decision in *Demore* v. *Kim*, 538 U.S. 510 (2003), holding that pre-final-order immigration detention of criminal aliens without a bond hearing is constitutionally permissible. See *Grullon* v. *Ashcroft*, No. 03-2097 (2d Cir. Nov. 10, 2003); see also Pet. App. 3a n.2 (noting parties' agreement that "the rationale for the district court's habeas ruling was * * * subsequently rejected by" *Demore*).

c. Petitioner's removal hearings took place in 2003. Pet. App. 3a. Throughout those proceedings, he conceded removability, but claimed he was eligible for cancellation of removal. *Ibid.*; Certified Administrative Record (A.R.) 10. He contended that under Section 240A(d)(1)'s stop-time rule, his period of continuous residence should not be deemed to end until he was convicted in February 2002—a reading of the statute that he admitted the Board had rejected four years earlier in *In re Perez*, 22 I. & N. Dec. 689 (B.I.A. 1999) (en banc). Pet. App. 3a; A.R. 21-22. In November 2002, counsel represented that petitioner "will move for cancellation of removal under INA § 240A." A.R. 282; see also A.R. 286 ("Respondent will be filing an application for cancellation of removal under INA Section 240A(a)."). But the certified administrative record contains no Form EOIR-42A—a seven-page "Application for Cancellation of Re-

moval for Certain Permanent Residents." See 8 C.F.R. 240.20(a) (2002) ("An application for the exercise of discretion under section 240A of the [INA] shall be submitted on Form EOIR–42.") (now codified at 8 C.F.R. 1240.20(a)).

Instead, at an August 21, 2003, hearing held before the immigration judge, petitioner submitted a document entitled "Respondent's Brief in Support of Respondent's Application for the Exercise of Favorable Prosecutorial Discretion" (A.R. 8-46),[2] with exhibits (A.R. 47-235). Petitioner argued that he was eligible for cancellation of removal because the interpretation of the stop-time rule given by the majority of the Board in *Perez* "is unreasonable and * * * should be re-examined by the federal court (or the Board)." A.R. 22. Like the *Perez* dissenters, 22 I. & N. Dec. at 705-706, he contended that his reading of the statute was supported by one sentence of 1996 legislative history. A.R. 28-29. He also relied on the fact that a bill then pending in Congress would have eliminated the stop-time rule in INA Section 240A(d)(1)(B). A.R. 34, 104.[3] Finally, he argued at length (as the title of his brief promised) that the INS should exercise prosecutorial discretion to avoid removing him. A.R. 34-45.

In a summary order dated August 21, 2003, the immigration judge checked the boxes indicating that petitioner was denied cancellation of removal and that he

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[2] As the alien responding to the charge of removability, petitioner was designated as the "respondent" in his administrative proceedings.

[3] Another bill that would repeal the time-stop rule was introduced in the House of Representatives last year. See H.R. 4022, 110th Cong., 1st Sess. § 4 (2007).

was ordered removed to the Dominican Republic. Pet. App. 19a-21a.[4]

d. Although petitioner reserved the right to appeal, Pet. App. 21a, he did not file an appeal with the Board. In the court of appeals, petitioner claimed that he did not exercise his right to appeal because he thought it would increase the chance that he would be returned to immigration detention. *Id.* at 15a n.9.

On October 10, 2003, petitioner filed another habeas petition in the district court, this time challenging the removal order. Pet. App. 4a. Because that proceeding was pending when the REAL ID Act became effective, the district court transferred the case to the Second Circuit, where it was docketed as a petition for review. *Id.* at 18a; see p. 5, *supra*.

In the court of appeals, petitioner conceded that he failed to exhaust his administrative remedies by not filing an appeal to the Board, but he urged the court to exercise jurisdiction and consider the merits of his challenge to the Board's interpretation of the stop-time rule in *Perez*. Pet. App. 1a-2a.

3. The court of appeals treated the transferred petition as a timely filed petition for review under INA Sec-

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[4] As the summary order indicates (Pet. App. 19a), the immigration judge's oral decision becomes the "official opinion" if the proceedings are "appealed or reopened." In a case like this, the Board's usual practice would have been to have the oral decision transcribed if and when petitioner appealed to the Board. 8 C.F.R. 3.5(a) (2003) (now codified at 8 C.F.R. 1003.5(a)). Because petitioner did not appeal to the Board, no transcript was prepared. Pet. App. 4a n.4. Petitioner appears neither to have asked for a transcript to be prepared nor to have made arrangements for a "stipulation regarding the facts or events that transpired" before the immigration judge. See *The Board of Immigration Appeals Practice Manual* Chap. 4.16(f)(iv) at 52 <http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/toc full.pdf>.

tion 242, but dismissed it for want of jurisdiction. Pet. App. 5a, 17a.

Relying on *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), the court first held that the exhaustion requirement in INA Section 242(d)(1), 8 U.S.C. 1252(d)(1), is statutory and jurisdictional, and thus required petitioner to appeal to the Board before seeking judicial review. Pet. App. 6a-9a.

The court next considered whether the statutory exhaustion requirement is subject to any exceptions. It expressly rejected petitioner's contention that an appeal to the Board would have been "futile" because the sole legal issue he wished to raise had already been decided against him by a majority of the full Board in *Perez*. Pet. App. 9a-13a. The court pointed out that the Board "could have reconsidered the *Perez* holding *in banc*, or it could have certified the question to the Attorney General." *Id.* at 11a. Although the court recognized that there may be limitations to requiring exhaustion where, for example, the administrative tribunal lacks authority to provide relief or to take any action in response to the complaint, it concluded that petitioner's futility argument "confuses the likelihood of adherence to precedent with the factual impossibility of relief." *Ibid.*

For similar reasons, the court rejected petitioner's alternative argument that an appeal would have been futile because "streamlin[ing]" regulations authorizing a single Board member to affirm an immigration judge's decision without an opinion would purportedly have prevented the question from being referred to a three-member or *en banc* panel. Pet. App. 11a-12a. As the court noted, those regulations would not require a single Board member to affirm if the member were convinced by petitioner's argument about the stop-time rule and

did not think "that the result reached in the decision under review was correct." *Id.* at 12a (quoting 8 C.F.R. 1003.1(e)(4)(i)).

The court also rejected petitioner's claim that because the Board's consideration of his case would have been constrained by *Perez*, an appeal to the Board would not have afforded him any administrative remedy "available as of right" that must be exhausted under Section 242(d)(1). To the contrary, the court held that petitioner "had a right to appeal the [immigration judge's] order of removal to the [Board]. And [petitioner] was statutorily required to exercise that right before appealing to this Court, notwithstanding his small chance of success." Pet. App. 12a-13a. In doing so, the court of appeals characterized the Ninth Circuit as having found that an appeal to the Board that is foreclosed on the merits by adverse precedent is not "available as of right" under Section 242(d)(1), and it rejected that interpretation. *Id.* at 12a (citing *Sun* v. *Ashcroft*, 370 F.3d 932, 941-942 (9th Cir. 2004)).

The court also denied petitioner's efforts to construe his anti-exhaustion arguments as constitutional claims or as falling within an asserted "manifest injustice" exception to the statutory exhaustion requirement. Pet. App. 13a-16a. The court held that, because this Court's recent decision in *Bowles* "broadly disclaims the 'authority' of the federal courts 'to create equitable exceptions to jurisdictional requirements,'" there can be no "'manifest injustice' exception to the jurisdictional bar created by 8 U.S.C. § 1252(d)'s exhaustion requirement." *Id.* at 16a.

ARGUMENT

The court of appeals held that the exhaustion requirement in INA Section 242(d)(1), 8 U.S.C. 1252(d)(1), is mandatory, jurisdictional, and not subject to an exception for futility or manifest injustice simply because petitioner would have had to overcome adverse precedent within the agency. That holding is correct, and it does not conflict with any decision of this Court or of any court of appeals. Moreover, it is almost certain that a favorable ruling for petitioner on the exhaustion issue could not lead to a different result in his case on remand, because the court of appeals has repeatedly (and correctly) construed the stop-time rule in INA Section 240A(d)(1), 8 U.S.C. 1229b(d)(1), in a way that is inconsistent with petitioner's underlying argument. Further review is therefore not warranted.

1. Exhaustion doctrines generally "provide[] 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). As this Court has explained, requiring exhaustion serves a number of purposes, including "preventing premature interference with agency processes"; allowing the agency to "function efficiently" and "correct its own errors"; providing the "parties and the courts the benefit of [agency] experience and expertise"; assuring the development of a record "adequate for judicial review"; and affording the agency an opportunity to decide whether a claim is "invalid" on other grounds or whether relief may be granted "under a different section of the Act." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); accord *McKart*, 395 U.S. at 193-194. Where Congress has specified by

statute that exhaustion is required, a court may not "dispens[e]" with that requirement based on the court's own assessment that exhaustion would be "futil[e]." *Salfi*, 422 U.S. at 766; accord *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.").

In this case, Congress has specified in the INA that judicial review of a final order of removal is contingent on exhaustion of the administrative remedies "available to the alien as of right." 8 U.S.C. 1252(d)(1). The statutory scheme, which requires an immigration judge to advise an alien of his "right to appeal" his removal order, 8 U.S.C. 1229a(c)(5), plainly allocates initial appellate review to the Board and makes such an appeal "available as of right" within the meaning of the exhaustion mandate in Section 242(d)(1). That conclusion is reinforced by 8 U.S.C. 1101(a)(47)(B), which specifies that an immigration judge's removal order becomes final only upon affirmance by the Board or upon expiration of the appeal period if no appeal to the Board is taken, whichever is earlier. Whether the Board would ultimately rule for the alien on the merits is irrelevant to whether an appeal to the Board—the relevant procedural remedy here—is "available to the alien as of right." And, consistent with Congress's directives, Department of Justice regulations provide that an immigration judge's removal order may not be executed during the appeal period or while review of the order is pending before the Board. 8 C.F.R. 1003.6(a). Cf. *Darby* v. *Cisneros*, 509 U.S. 137, 154 (1993) (concluding that "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an

agency rule requires appeal before review and the administrative action is made inoperative pending that review").

This statutory mandate of exhaustion serves to vest exclusive initial appellate jurisdiction in the agency. See *Bowles*, 127 S. Ct. at 2365-2366 ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). Given the statutory underpinnings of the exhaustion requirement in removal proceedings, the court of appeals correctly applied this Court's decision in *Bowles* when it concluded that the requirement is mandatory and that petitioner's decision not to exercise his right to appeal his removal order to the Board deprived the courts of jurisdiction to consider his petition for review. Pet. App. 5a-9a.

Moreover, even if the exhaustion requirement in Section 242(d)(1) were not jurisdictional (in the absolute sense that it could not be waived by the government), it is still mandatory. Congress itself has specified that a "court may review a final order of removal *only if*—(1) the alien has exhausted all administrative remedies." 8 U.S.C. 1252(d) (emphasis added). See *Greenlaw* v. *United States*, No. 07-330 (U.S. June 23, 2008), slip op. 7, 8-15 (declining to decide whether a statutory requirement that the government appeal or cross-appeal a criminal sentence is "jurisdictional," but recognizing no judicial discretion to make exceptions to that requirement); cf. *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005) (per curiam) (explaining that, even when a time limit in a procedural rule is not "jurisdictional," the court's duty to apply it is "mandatory" when the other party raises an objection of untimeliness).

2. a. Despite petitioner's claim to the contrary (Pet. 20), the courts of appeals are not "split 2 to 1 over the question presented."

The Fifth Circuit's decision in *Arce-Vences* v. *Mukasey*, 512 F.3d 167 (5th Cir. 2007), is readily distinguishable in several ways from that of the court below. As an initial matter, the Fifth Circuit was not presented with a situation in which the alien completely bypassed an appeal to the Board—conduct that, as this case demonstrates (see note 4, *supra*), has its own unfortunate consequences. The alien in that case did appeal to the Board, but failed to present a particular legal argument in that appeal. 512 F.3d at 170. In addition, *Arce-Vences* concluded that presentation of the particular legal argument to the Board in the first instance was unnecessary when the Board would have been powerless to depart from "clearly established *Fifth Circuit law* applicable at the time of its review." *Id.* at 172 (emphasis added). Here, by contrast, the agency unquestionably would have had the power to distinguish, refine, or depart from its own prior decision. Moreover, *Arce-Vences* makes no mention of *Bowles* and how it affects the analysis. Finally, the unexhausted question in *Arce-Vences* (whether the alien was an aggravated felon) affected the scope of the Fifth Circuit's own jurisdiction to review his petition, which meant that the court had jurisdiction to consider it in any event. See *Omari* v. *Gonzales*, 419 F.3d 303, 306 (5th Cir. 2005) ("Under 8 U.S.C. § 1252(a)(2)(C) this court does not have jurisdiction to review the removal decision if Omari's prior conviction was an aggravated felony. However, we do have jurisdiction to determine our own jurisdiction, *i.e.*, to determine whether the conviction qualifies as an aggravated felony.") (citation and footnote omitted).

The Ninth Circuit's decision in *Sun* v. *Ashcroft*, 370 F.3d 932 (9th Cir. 2004), also fails to present a square conflict with the decision below, despite the Second Circuit's statement (Pet. App. 12a) that it "reject[ed] the Ninth Circuit's interpretation." The aspect of the Ninth Circuit's discussion in *Sun* that is crucial to petitioner —the assumption that "an appeal foreclosed [on the merits] by an en banc Board decision" is not an appeal "as of right," Pet. 23—was not necessary to its decision. In *Sun*, the court recognized that INA Section 242(d)(1) imposes a mandatory exhaustion requirement where administrative remedies are "available to the alien as of right." See 370 F.3d at 941-942. The court posited that some issues "may be so entirely foreclosed by prior BIA case law that no remedies are 'available . . . as of right,'" but reasoned that the realm of such issues "cannot be broader" than "the futility exception to prudential exhaustion requirements." *Id.* at 942. Against that backdrop, the court concluded that, because an en banc Board decision cited by the alien did *not* control his case, he "did not meet the futility standard for prudential exhaustion"—meaning that, *a fortiori*, administrative remedies were available under the "as of right" standard, which was at least as stringent. *Id.* at 944.

Sun thus simply concluded that the scenario it posited, in which administrative remedies may not be available as of right, was not present because a necessary condition for reaching such a result was not present. *Sun* does not affirmatively establish that the Ninth Circuit would actually hold that the requirement of taking an appeal to the Board could be dispensed with if an en banc Board decision *did* foreclose victory on the merits before the Board (as petitioner claims here). The consequence of such a holding would be to append to Section

242(d)(1) the very sort of judicially administered futility exception that this Court in *Salfi* and *Booth* rejected in the context of statutory exhaustion requirements. But even assuming the Ninth Circuit would have reached that result in a future case after *Sun*, it has not had a chance to address the relationship between prudential and statutory exhaustion requirements since this Court "sharpened the analysis" (Pet. App. 7a) of the prerequisites to judicial review in *Bowles*.[5] See *Galbraith* v. *County of Santa Clara*, 307 F.3d 1119, 1123-1124 (9th Cir. 2002) (recognizing that a panel "may overrule prior circuit authority without taking the case en banc when 'an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point'") (quoting *United States* v. *Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985)).

Moreover, the other Ninth Circuit cases petitioner cites (Pet. 22) reveal that other factors present in this case would in any event warrant prudential exhaustion in the Ninth Circuit's view. In *Puga* v. *Chertoff*, 488 F.3d 812 (2007), the court required an alien to exhaust his ineffective-assistance-of-counsel claim by filing what would otherwise have been a discretionary motion to reopen, because aliens should not be allowed "to bypass the administrative scheme that is in place to deal with [such] claims." *Id.* at 815. In *Noriega-Lopez* v. *Ashcroft*, 335 F.3d 874 (2003), the court held that an alien

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[5] Even before *Bowles*, the Ninth Circuit applied *Sun*'s exhaustion analysis in only two unpublished memorandum dispositions. In both cases, the aliens had in fact appealed to the Board before seeking judicial review but failed to raise an unspecified claim of statutory construction that was foreclosed by Board precedent in some unspecified way. See *Murillo Noguez* v. *Gonzales*, 163 Fed. Appx. 485 (2006); *Orozco Segura* v. *Gonzales*, 159 Fed. Appx. 779 (2005).

did not need to move to reopen with respect to a question decided in his case by the Board *sua sponte*, because there was a "proper record available, * * * the [Board] necessarily decided the legal question," and there had been "no deliberate bypass of the administrative scheme." *Id.* at 881. By contrast, in this case, the record is inadequate, petitioner has altogether bypassed the agency's administrative scheme, and the Board did not get a chance to decide whether *Perez* applies to the case, whether *Perez* continues to reflect the Board's views, and whether petition might be granted or denied relief on grounds quite apart from *Perez*.

b. Petitioner's contention (Pet 27, 30-32) that the Board's decision in *Perez* and its streamlining procedures under 8 C.F.R. 1003.1(e)(4) have rendered an appeal in his case discretionary, rather than "as of right," are unavailing for two reasons.

First, allowing aliens to bypass the agency's internal appeal process is inconsistent with the fundamental nature of agency decisionmaking. Petitioner sought to overturn the agency's construction of a purportedly ambiguous statute (the stop-time rule in INA Section 240A(d)(1)). Agencies are entitled to change their positions on such questions, either on account of new facts or new policies, or even (as had occurred here since *Perez* was decided) "a change in administrations." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005). Under petitioner's view, however, once an agency's initial decisionmaker disposes of a contested case, the agency's top decisionmakers (here, either the Board or the Attorney General) may not even get the opportunity to reconsider their own, or their predecessors', interpretations before judicial review occurs. Appeals that challenge the Board's prior

decisions are the principal means by which it would gather information about the "wisdom of its policy on a continuing basis." *Id.* at 981 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 864 (1984)). But petitioner would deprive the Board of that means. Indeed, the deference that courts owe to the results of the Board's "process of case-by-case adjudication" concerning an issue like cancellation of removal, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)), would be subverted if aliens could routinely bypass the Board without giving it an opportunity to reconsider an issue in the light presented by later cases.

Second, petitioner's assertion that *Perez* would have required the Board to streamline his appeal is entirely speculative, because there is no foundation in the record for his assumption that the immigration judge denied his request for cancellation under *Perez* rather than on any other dispositive ground. *See* note 4, *supra*, and p. 22, *infra*. Nor is there any such foundation for the proposition that the Board would not have granted or denied his request on another ground. His argument also ignores the possibility of legal or policy developments that could have occurred while his appeal to the Board was pending (such as a refinement or reconsideration of *Perez* by the Board or the Attorney General, or a rejection of *Perez* by the Second Circuit). Such uncertainty about what the state of the law would have been when the Board would have considered and disposed of his case necessarily undermines his claim that an alien and a reviewing court should be permitted to determine *ab initio* that any appeal would have been futile in a case such as this. And petitioner's argument likewise ignores the importance of affording the Board an opportunity to determine in

the first instance whether a particular legal argument actually *is* foreclosed by a prior Board decision, and affording the reviewing court the benefit of the Board's expertise on that question. As a result, petitioner's denigration of the Board's streamlining procedures (which were never applied to his case) is especially misplaced.

c. Petitioner faults the court of appeals for relying on *Booth* v. *Churner*, *supra*, contending (Pet. 30-31) that the statute here differs from 42 U.S.C. 1997e(a), the section of the Prison Litigation Reform Act construed in that case. Petitioner's comparison between that statute and INA Section 242(d)(1) reveals nothing about whether an appeal to the Board is, as petitioner claims (Pet. 31), "merely 'discretionary,'" or rather is available "as of right," as the text of 8 U.S.C. 1229a(c)(5) establishes, see p. 12, *supra*.

d. Petitioner's policy argument (Pet. 28-29) that the decision below creates confusion, and will force aliens with limited resources to engage in "guess-work" to determine "how much exhaustion is enough," is precisely backwards. The court of appeals' decision makes clear that aliens must exhaust their right to appeal their removal orders to the Board before seeking judicial review. That this clear rule does not redound to the benefit of petitioner, who deliberately bypassed that course, is unfortunate for him, but, as this Court recognized in *Bowles*, Congress has not authorized the federal courts to excuse non-compliance with statutory prerequisites to judicial review. Indeed, such judicially created exceptions "would no doubt detract from the clarity of the rule." 127 S. Ct. at 2367.

3. a. Even assuming that the court of appeals had jurisdiction to entertain petitioner's legal challenge to the Board's established interpretation of the stop-time

rule, this case would not be a suitable vehicle for the jurisdictional argument because the Second Circuit has already repeatedly (and correctly) described the stop-time rule in terms that reject petitioner's argument on the merits.

The stop-time rule in Section 240A(d)(1) of the INA provides that "any period of continuous residence * * * in the United States shall be deemed to end * * * (B) *when the alien has committed an offense* * * * that renders the alien * * * removable from the United States" under certain provisions of the INA. 8 U.S.C. 1229b(d)(1) (emphasis added). In *Perez*, the majority of the Board correctly interpreted that plain language as terminating the accrual of a period of continuous residence on the date the alien committed the relevant offense, rather than the later date of his conviction. See 22 I. & N. Dec. at 692-694. As petitioner concedes (Pet. 26), his "only argument on the merits is that the dissenters in *Perez*, rather than the majority, correctly construed the stop-time rule in [S]ection 240A(d)(1)." See also Pet. 17.

The Second Circuit, moreover, has repeatedly expressed approval of the conclusion reached by the *Perez* majority and thus disagreed with petitioner's underlying claim on the merits—both before and after its decision in this case. See, *e.g.*, *Martinez* v. *INS*, 523 F.3d 365, 369 (2008) ("[I]t is the date of the commission of the offense—not the date of the subsequent conviction—that matters for purposes of computing an alien's period of continuous residence" under Section 240A(d)(1)); *Reid* v. *Gonzales*, 478 F.3d 510 (2007) ("[T]his Court has itself recently stated that [Section 240A(d)(1)] cuts off a petitioner's period of continuous residence at the time he commits a criminal offense, not when he is convicted of

that offense."); *Tablie* v. *Gonzales*, 471 F.3d 60, 62, 64 (2006) (explaining that "[u]nder subsection 240A(d)(1), * * * the alien's continuous residency or physical presence ends, for purposes of cancellation of removal, on the date he commits a qualifying offense"; holding that alien's "1984 false statement ended his period of continuous residence"); *Kamagate* v. *Ashcroft*, 385 F.3d 144, 151 n.11 (2004) (measuring alien's continuous residence for purposes of Section 240A(d)(1) from the date of admission "until the October 30, 1996 start of the conspiracy on which he was [later] convicted"). Other courts of appeals have also described the stop-time rule as being based upon the date the crime was committed rather than the date of the conviction."

Accordingly, petitioner's underlying challenge to his removal order is itself futile. Any ruling in petitioner's favor on the jurisdictional issue would not change the result of his removal proceeding unless the Second Circuit or this Court decided—despite the decisions quoted above and the absence of any court of appeals authority to the contrary—to depart from the plain language of the statute governing the merits of his case (a question

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" See *Valencia-Alvarez* v. *Gonzales*, 469 F.3d 1319, 1321 (9th Cir. 2006) (explaining that Section 240A(d)(1) "'stops' an alien's accrual of continuous presence in the United States at the time that he commits a crime"); *Nuñez-Cruz* v. *Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006) (explaining that Section 240A(d)(1)(B) "stops the accrual of time upon the commission of certain crimes"); *Peralta* v. *Gonzales*, 441 F.3d 23, 31 (1st Cir. 2006) (holding that there are three triggers to the stop-time rule in Section 240A(d), the second one being "commission of a specified crime"); *Hearon* v. *Gonzales*, 473 F.3d 167, 176 (5th Cir. 2006) (agreeing with *Peralta*); *Okeke* v. *Gonzales*, 407 F.3d 585, 590 (3d Cir. 2005) (treating "the commission of a controlled substance offense" as "a clock-stopping event" under Section 240A(d)(1)); see also *Dabuay* v. *Attorney General of U.S.*, 129 Fed. Appx. 747, 749 (3d Cir. 2005).

that is not fairly included within the question presented by the petition).

b. This case also presents a poor vehicle for further review because the record does not even make clear that petitioner was denied cancellation of removal on account of *Perez*'s interpretation of the stop-time rule.

Petitioner's arguments are predicated on the assumption that the "interpretation of the stop-time rule" governs "his eligibility for cancellation" of removal. Pet. 16. But, tellingly, he has no citation for his assertion (Pet. 17) that "the IJ pretermitted [petitioner's] application" after "[d]eclaring [him] to be ineligible for cancellation." As the court below recognized, because of petitioner's "failure to appeal to the BIA," "the record on this appeal" does not identify "the actual grounds for the order of removal." Pet. App. 4a n.4; see also note 4, *supra*.

Because the certified administrative record does not contain an actual application for cancellation of removal (Form EOIR-42A), petitioner's request could have been submitted past the filing deadline, or been deemed abandoned, and denied on that ground. 8 C.F.R. 1003.31(c) ("If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived."). It is also possible that the request was denied (perhaps in the alternative) in the exercise of the immigration judge's discretion—a question petitioner addressed at length in his brief to the immigration judge. A.R. 25-36; see also 8 U.S.C. 1229b(a) (providing that removal "may" be cancelled). As a result, the record does not establish that the denial of petitioner's request for cancellation rested *solely* (or at all) on the Board's decision in *Perez*.

Under these circumstances, petitioner is not well-positioned to claim that an appeal to the Board would have been futile. Pet. 20-33. Indeed, the deficiencies in the record help to illustrate the benefits of exhaustion. The filing of an appeal to the Board would not only have led to the transcription of any oral decision rendered by the immigration judge and clarified the reasons for the denial of relief, it would have allowed the Board an opportunity to correct any errors in that decision (on either legal or discretionary issues), or to decide his case on alternative grounds, perhaps rendering judicial review unnecessary or at least ensuring that it would be "informed and narrowed by the agenc[y's] own decisions." *Schlesinger* v. *Councilman*, 420 U.S. 738, 756 (1975). The court of appeals therefore reasonably and correctly required exhaustion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

GREGORY G. KATSAS
Assistant Attorney General

DONALD E. KEENER
M. JOCELYN LOPEZ WRIGHT
Attorneys

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No. 07-1310

IN THE

Supreme Court of the United States

JULIO CESAR VALENZUELA GRULLON,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, MICHAEL J. GARCIA, EDWARD J. MCELROY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

BOZENA ZIEDALSKI
350 Fifth Ave, Suite 1729
New York, NY 10118
(212) 629-0454

MARK E. HADDAD*
ROBERT A. HOLLAND
SETH M. GOLDSTEIN
HOLLY L. HENDERSON
MAYA R. RUPERT
SIDLEY AUSTIN LLP
555 W Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

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REPLY BRIEF

Valenzuela-Grullon ("Valenzuela") demonstrated in his petition that the "streamlining" regulations precluded the Board of Immigration Appeals ("Board") from ruling in his favor on his challenge to the Board's prior en banc construction of the stop-time rule. The Department of Justice ("DOJ") stated it well when it promulgated those rules: "Appellants *do not have any vested right* or entitlement to review by a three-member panel of the Board [of Immigration Appeals], or even an expectation that their case is more likely than not to be referred to a three-member panel." *Board of Immigration Appeals: Procedural Reforms To Improve Case Management,* 67 FR 54878, 54898-99 (Aug. 26, 2002) (emphasis added). Rather, appellants are directed to a single member of the Board, who "shall affirm the decision ... without opinion" where, as here, the Board has previously decided the legal issue. 8 C.F.R. § 1003.1(e)(4); see Pet. 3-4.

Nowhere does Respondent refute Valenzuela's presentation of the streamlining regulations and their foreclosure of his challenge to a prior en banc decision of the Board. Instead, Respondent points to an administrative regime that DOJ might have created, rather than the one it did create. No one disputes that an agency could allow itself to reconsider its en banc rulings. See BIO 17-18. This agency, however, has denied itself that power in circumstances like Valenzuela's, by adopting rules that compel its members to deny appeals that seek to reverse a prior en banc decision. Under these rules, such an appeal is a wasteful formality that does not constitute an "administrative remed[y] available ... as of right" under 8 U.S.C. § 1252(d)(1) and thus does

not deprive the federal courts of jurisdiction over a petition for review.

Respondent also urges the Court to deny the petition for other reasons – that the split the Second Circuit acknowledged is not a formal split, that federal courts have "described" the stop-time provision as the Board construed it, and that the documentation of the Immigration Judge's ("IJ") decision is not adequate to support the petition. As shown below, none of these objections has merit.

1. The fundamental question presented is whether the streamlining rules so constrain the ability of the Board to entertain an appeal challenging a prior en banc decision that the availability of an appeal procedure is not an administrative remedy available "as of right" under of 8 U.S.C. § 1252(d)(1). The petition sets forth the applicable rules in detail, and explains why, had Valenzuela filed an appeal seeking to overturn the Board's en banc decision in *In re Perez*, 22 I. & N. Dec. 689 (BIA 1999), a single Board member would have been constrained to deny it summarily. Pet. 9-14.[1]

Rather than refute Valenzuela's presentation of the streamlining rules, Respondent points "[f]irst" to "the fundamental nature of agency decisionmaking" which is said to be that "[a]gencies are entitled to change their positions . . . ." BIO 17. One would have thought that "changing positions" (especially those adopted en banc) would be more of an exceptional,

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[1] *Perez* was a precedential decision. See 8 C.F.R. § 1003.1(g). Only the Attorney General or another en banc panel of the Board have authority to overturn an en banc ruling, *id.*, and only in limited circumstances that petitioner could not invoke. See id. § 1003.1(a)(5); § 1003.1(e)(6).

rather than a fundamental, attribute of agency decisionmaking. In any event, the dispositive point is that the streamlining rules have withdrawn from individual Board members whatever freedom the agency might otherwise inherently possess to change precedential decisions. An appeal challenging an en banc decision cannot lead to the kind of reconsideration Respondent now extols, because streamlining requires a board member summarily to deny any such appeal. It is not "petitioner" who "would deprive the Board" of the "means" to reconsider its prior decisions. BIO at 18. That wound was self-inflicted.

Second, Respondent argues that "there is no foundation" for thinking that the IJ denied his request for cancellation under *Perez*. BIO at 18. As shown below (pages 8-11, *infra*), that is flatly incorrect. *Perez* was the only reason for the denial, and the speculative alternatives were not and could not have been considered. Respondent also suggests that perhaps other changes in law might have affected the fate of Valenzuela's appeal to the Board. Such changes did not occur, however, and in all events Valenzuela's appeal could not have prompted them. That lightning might strike in some other proceeding does not transform the Board's truncated process into a remedy available as of right for Valenzuela.

Respondent also argues that a Board appeal remains essential to afford the reviewing court "the benefit of the Board's expertise" on whether "a particular legal argument *is* foreclosed by a prior Board decision . . . ." BIO 19. That is inapposite here, where the legal argument is that the four dissenters in *Perez* were correct. The Board fully addressed the stop-time rule in *Perez*, has reaffirmed

it many times since, and so the usual concerns underlying an exhaustion requirement (BIO at 11) are inapplicable here.

Finally, Respondent argues that an appeal to the Board must be a remedy available as of right because Congress requires IJs to "advise an alien of his 'right to appeal' his removal order. . . . " BIO 12 (*citing* 8 U.S.C. § 1229a(c)(5)), and because it is "mandatory" that aliens file such appeals. BIO 13. These arguments beg the question. No one disputes that the statute permitted Valenzuela to file an appeal with the Board, or that it is mandatory that administrative remedies be exhausted. None of that answers the separate question, which is whether, given that the streamlining rules have withdrawn from the Board any ability to entertain his appeal other than to summarily deny it, an appeal to the Board constitutes a "remed[y] . . . available as of right."

2. The conflicting answers given by the Second, Fifth, and Ninth Circuits to this central question confirm that the circuit split here is a real one that warrants plenary review. It is established law in both the Fifth and Ninth Circuits that where law constrains the Board's ability to rule in favor of an alien on a given issue of law, the alien need not present that issue to the Board in order to exhaust administrative remedies. *Arce-Vences* v. *Mukasey*, 512 F.3d 167 (5th Cir. 2007); *Sun* v. *Ashcroft*, 370 F.3d 932 (9th Cir. 2004).

Respondent principally seeks to distinguish *Arce-Vences* on the ground that the alien failed only to raise a particular issue before the Board, not to take an appeal. That distinction played no role in the Fifth Circuit's decision, however; the only reason that the court found that it had jurisdiction to decide the

claim at issue was because the Board was constrained by law not to remedy that claim and "§ 1252(d)(1) only requires that an alien exhaust administrative remedies that are *available as of right*." *Id.* at 172 (emphasis in original). Respondent argues that in *Arce-Vences* the Board "was powerless to depart from" a controlling decision of a federal court rather than an en banc decision of the Board. BIO at 14. Under the streamlining regulations, however, an individual Board member is every bit as powerless to depart from an en banc Board decision. Respondent further contends that the Fifth Circuit had jurisdiction to consider the unexhausted question "in any event" because it affected the scope of the court's jurisdiction. This is not the grounds on which the Fifth Circuit decided the issue. Indeed, the Fifth Circuit expressly notes that it was *not* holding that § 1252(d)(1) would never bar its consideration of whether an offense was an aggravated felony. *Id.*

Respondent argues that *Sun* v. *Ashcroft*, 370 F.3d 932 (9th Cir. 2004) fails to present a square conflict because the Ninth Circuit ultimately concluded that the alien's argument was not foreclosed by a prior en banc Board decision and it is unknown what the court would have done if it had been foreclosed. *Sun* clearly states, however, that "[s]ome issues may be so entirely foreclosed by prior BIA case law that no remedies are 'available . . . as of right'," *id.* at 942, and this clear statement repeatedly has been treated within the Ninth Circuit as settled law. As Respondent concedes, *see* BIO at 16 n. 5, the Ninth Circuit has applied the rule on two occasions to exercise jurisdiction over claims that aliens had failed to present to the Board. *See Murillo Noguez* v. *Gonzales*, 163 Fed. Appx. 485 (2006); *Orozco-Segura* v. *Gonzales*, 159 Fed. Appx. 779 (2005); *see also Puga*

v. *Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (citing *Sun* as settled law, and relying on other grounds (see *Matter of Lozada*, I. & N. Dec. 637 (BIA 1988)) that warranted consideration of the issue by the Board in the first instance). Certainly the Second Circuit understood that its decision conflicted with *Sun* when it stated that it "reject[ed] the Ninth Circuit's interpretation." Pet. App. 12a. However finely *Sun* might be parsed, both the Ninth and Second Circuits have construed it in a manner that conflicts with the decision below.

Respondent suggests that both the Fifth and Ninth Circuits might reach different decisions were they to consider this Court's decision in *Bowles*. *Bowles* is inapposite on the merits here, however, because Valenzuela is not seeking a jurisprudential exception to § 1252(d)(1). *Bowles* is relevant only as it illustrates what the devastating consequences would be of finding a bar to the exercise of federal jurisdiction where – as here – none exists.

Finally, Respondent's suggestion (BIO at 19) that the decision below has created a clear rule misses the point. The confusion lies in the differing understandings of the Second, Fifth, and Ninth Circuits. Indeed, by suggesting ways in which the existing decisions can be limited, Respondent further illustrates how reliance on seemingly clear precedent within a circuit may be a trap for the unwary. The importance of a clear rule is underscored by the tens of thousands of Board appeals subject to the exhaustion rule each year.

3. Respondent suggests that the petition be denied because the Second Circuit has elsewhere rejected Valenzuela's argument regarding the stop-time rule. BIO 19-22. This is incorrect.

Respondent initially and mistakenly asserts that the Second Circuit has "repeatedly (and correctly) *construed* the stop-time rule in a way that is inconsistent with Valenzuela's underlying argument." *Id.* at 11 (emphasis added). Later, however, Respondent states that the Second Circuit and other courts of appeals "have already repeatedly (and correctly) *described* the stop-time rule in terms that reject petitioner's argument on the merits." *Id.* at 20 (emphasis added); *see also id.* at 21. This retreat in terminology is telling. No court of appeals has been squarely presented with the issue of whether the stop-time rule terminates an alien's period of continuous residence upon the date of conviction or of the underlying offense. Respondent's cases confirm this point.

For example, in both *Martinez* v. *INS*, 523 F.3d 365, 369 (2d Cir. 2008), and *Tablie* v. *Gonzales*, 471 F.3d 60, 62 (2d Cir. 2006), the petitioner only challenged the retroactive application of the rule, and the court of appeals appears to have assumed, without deciding, that the Board's construction was correct. In *Reid* v. *Gonzales*, 478 F.3d 510 (2d Cir. 2007), petitioner, who "present[ed] [the court of appeals] with a series of sparse and unsupported arguments," "appear[ed] to argue that petitioner's case falls outside the holding of" *Perez*, but did not challenge *Perez* itself. The rule was not at issue in *Kamagate* v. *Ashcroft*, 385 F.3d 144, 151 n. 11 (2d Cir. 2004), where both the alien's commission of the crime and his conviction for the crime occurred after he had been continuously present in the United States for seven years. The proper construction of the rule also was not an issue in the other cases Respondent cites, because the date of conviction was within seven years of admission. *See Valencia-*

Alvarez v. *Gonzales*, 469 F.3d 1319, 1321 (9th Cir. 2006) (alien admitted in 1991 and convicted in 1997); *Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006) (alien admitted in 1988 and convicted in 1993); *Peralta* v. *Gonzales*, 441 F.3d 23, 31 (1st Cir. 2006) (alien admitted in 1991 and convicted in 1995); *Heaven* v. *Gonzales*, 473 F.3d 167, 176 (5th Cir. 2006) (alien admitted in 1991 and convicted in 1995); *Okeke* v. *Gonzales*, 407 F.3d 585, 590 (3d Cir. 2005) (alien admitted in 1981 and convicted in 1983).

Because no court of appeals has squarely addressed the issue of whether an alien's period of continuous residence terminates upon conviction for a crime or some earlier date, Valenzuela's petition for review would present the Second Circuit with an important issue of first impression. The fact that four Board members dissented in *Perez* is itself a strong indication that the construction of the stop-time rule warrants federal court review. Further, the difficulties in selecting a date corresponding to the underlying conduct, compared to the certainty with which a date of conviction is known, weighs heavily in favor of employing the latter.

4. Finally, Respondent argues repeatedly that the record does not support a finding that Valenzuela was denied cancellation of removal based upon *Perez*, and that the record would be more complete had Valenzuela appealed to the Board. BIO at 14, 18-19, 22-23. Neither assertion is true.

Valenzuela was ordered removed and denied cancellation at a "master calendar" hearing on August 21, 2003. JA 254; Pet. App. 19a-21a. This was unusual, as master calendar hearings are not typically final hearings. *See* EOIR, *Immigration Court Practice Manual*, Ch. 4.15(a) (rev. ed. March 2008), *available at*

http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.html ("*Manual*") ("A respondent's first appearance before an Immigration Judge in removal proceedings is at a master calendar hearing. Master calendar hearings are held for pleadings, scheduling, and other similar matters.") At a master calendar hearing, the IJ typically advises the alien of his rights, explains the charges, factual allegations, and legal issues, sets deadlines for filing applications for relief and other documents, and schedules an individual hearing to adjudicate contested matters and applications for relief. *See id.* at Ch.. 4.15(e). An alien's challenges to removal and applications for relief are then resolved at the individual hearing. *Id.* at Ch. 4.16(a) ("Evidentiary hearings on contested matters are referred to as individual calendar hearings or merits hearings. Contested matters include challenges to removability and applications for relief.")

Here, the IJ ruled unexpectedly at the master calendar hearing that Valenzuela was not eligible for cancellation of removal because of *Perez*. He never scheduled an individual calendar hearing, and never set any deadlines for filing an application for cancellation (Form EOIR-42A) or supporting papers in advance of such a hearing. Thus, he did not deny, and could not have denied, cancellation of removal on the basis that the request was "past the filing deadline" or "abandoned." BIO 22. Similarly, he did not deny, and could not have denied, cancellation (in addition to or in the alternative to *Perez*) as an exercise of his "discretion." *Id.*; see 8 U.S.C. § 1229b(a). At a master calendar hearing, the record for an exercise of discretion is incomplete; before weighing the equities, the judge would have set an individual hearing and allowed the parties to submit

applications, motions, exhibits and testimony as appropriate. *See Manual* at Ch. 4.16(b).

Instead, the IJ concluded that he could not cancel removal because of *Perez*. Notably, Respondent, who was present at the hearing, has never affirmatively argued that cancellation was denied for some reason other than *Perez*.

Rather, Respondent has asserted that the record fails to establish that *Perez* was the basis for denial. Respondent maintains that if Valenzuela appealed to the Board, the record would contain a transcript of the IJ's oral decision. When Respondent attempted, however, to prepare a transcript of the oral decision in conjunction with Valenzuela's habeas petition, *see* JA 1, it could not do so, because of the poor quality of the available recordings. *See* Respondents' Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, *Valenzuela Grullon* v. *Ashcroft*, Case No. 03 Civ. 8039 (TPG) (S.D.N.Y. filed Mar. 30, 2004) at 5 n. 4 ("Because Valenzuela did not file an appeal with the BIA, the Executive Office for Immigration Review did not prepare a transcript of his appearances before the IJ. *See generally Matter of Ambrosio*, 14 I. & N. Dec. 381, 383 (BIA 1973). ICE obtained copies of recordings thereof for this Office, but the quality of those copies did not permit us to prepare a transcript."). Respondent has never made any showing that the tapes that would have been used for a Board appeal would have been any more audible than the copies provided for the District Court.

Finally, a written decision by the Board would have shed no additional light on the proceedings below. A Board member would have been required, by rule, to issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision

below. The decision below is, therefore, the final agency determination. See *8 CFR 1003.1(e)(4).*" 8 C.F.R. § 1003.1(e)(4)(ii). Such an order "shall not include further explanation or reasoning." *Id.* In short, nothing would have amplified the record had Valenzuela appealed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BOZENA ZIEDALSKI
350 Fifth Ave, Suite 1729
New York, NY 10118
(212) 629-0454

MARK E. HADDAD*
ROBERT A. HOLLAND
SETH M. GOLDSTEIN
HOLLY L. HENDERSON
MAYA R. RUPERT
SIDLEY AUSTIN LLP
555 W Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

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